IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1688

LE ROY SYMM, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

On Appeal From The United States District Court For The Southern District Of Texas

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment and injunction of the United States District Court for the Southern District of Texas, entered on March 3, 1978, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinions of the District Court for the Southern District of Texas, Houston Division, are reported in 445

F. Supp. 1245 (1978), 430 F. Supp. 920 (1977) and 422 F. Supp. 917 (1976). Copies of such opinions and the order or judgment accompanying each are included in the separate volume entitled "Rule 15 Appendices to Jurisdictional Statement".

JURISDICTION

This suit was brought under the Fourteenth, Fifteenth and Twenty-Sixth Amendments to the Constitution of the United States, and 42 U.S.C. 1971(a), 1971(c), 1973, 1973j(d), 1973bb, and 28 U.S.C. 2201. The final judgment and injunction of the District Court was entered on March 3, 1978, and notice of appeal was filed in that court on March 27, 1978. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253, and Title 42, United States Code, Section 1973bb.

STATUTES INVOLVED

The 26th Amendment to the United States Constitution, 42 U.S.C., Section 1973bb, and Articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a, 5.18a of the Texas Election Code are not alleged to be invalid, but they are involved in the case, and are therefore included in the separate volume entitled "Rule 15 Appendices to Jurisdictional Statement".

QUESTIONS PRESENTED

(1) Whether, or to what extent, state requirements of residence as a prerequisite to voting should be emasculated by federal courts under the guise of enforcing the 26th Amendment.

(2) Whether the 26th Amendment authorizes a federal court to implement a definition of voting residence different than the definition contained in the Texas Election Code, when the validity of the state definition is not challenged in the suit.

(3) Whether the 26th Amendment authorizes a federal court to supplant the judgmental determination of residence which the Texas Legislature left to the discretion of the individual registrars of voters, when the state statutory provisions are not challenged in the suit.

(4) Whether the appellant has denied voter registration on account of age, or rather, on account of nonresidence.

(5) Whether the District Court correctly distinguished the contrary holdings and final judgments in two prior cases involving the same real parties and the same causes of action.

(6) Whether the District Court correctly decided that the Secretary of the State of Texas has the authority under Texas law to direct any registrar of voters in Texas not to use a questionnaire to determine whether an applicant for voter registration is a resident of the county in which he is attempting to register.

STATEMENT OF THE CASE

This case involves voter registration practices in Waller County, Texas. The same practices and the same Defendant Symm have twice before been the subject of federal court litigation and prevailed. *Wilson v. Symm*, 341 F. Supp. 8 (S. D. Tex. 1972) and *Ballas v. Symm*, 351 F. Supp. 876 (S. D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974) (hereinafter *Wilson* and *Ballas*).

In the present case the United States sued the State of Texas, the Secretary of State of Texas, the Attorney General of Texas, Waller County, Texas, and Le Roy Symm, Tax Assessor-Collector (registrar of voters) of Waller County, Texas, under the Voting Rights Act and the 14th, 15th and 26th Amendments, alleging discrimination on the basis of age and race. While only registration practices within Waller County were complained of, the State of Texas, its Secretary of State and Attorney General, were included as defendants because they allegedly have the authority under the Texas Election Code to stop the registration practices complained of. These three state-level defendants originally answered by denying that they possessed such authority, but subsequently amended their answers to assert such authority and a cross-claim to enjoin Symm from engaging in the subject practices. Symm denied all allegations and by a cross-claim sought a declaratory judgment that the Secretary of State was without authority under the Texas Election Code to direct him or any other registrar of voters in Texas not to use a questionaire to determine whether an applicant for voter registration is a resident of the county in which he is attempting to register.

The conclusions to be drawn from the evidence are of central importance to the appeal. The specific facts will therefore be considered in some detail under the next section of this statement, which deals with the substantiality of the questions presented. We are convinced the evidence shows a conscientious effort by Symm to uniformly implement the meaningful residence requirements of the Texas Election Code, irrespective of the age, student status or race of the applicant for voter registration. If the initial application for voter registration,

personal knowledge, existing registration rolls, or ad valorem tax rolls objectively indicate Waller County residence, the applicant is registered; if not, the applicant is sent a questionaire pertaining to residence. (Copy attached to District Court opinion at 445 F. Supp. 1262). If the completed questionnaire and prior information taken together objectively indicate Waller County residence, the applicant is registered; if not, the applicant is sent notice of the opportunity for a hearing, which can likewise establish Waller County residence and result in registration. If the applicant is rejected after the hearing, he or she is informed in writing of the right to an expedited appeal to state district court, which no rejected applicant has pursued.

The United States claims the Symm practices prevent an indeterminable number of students at Prairie View A & M University from voting in Waller County, while nonstudents similarly situated are supposedly allowed to vote. The practices allegedly discriminate against such students on the basis of age and race, and thereby violate the Voting Rights Act and the 14th, 15th and 26th Amendments. The claims of racial discrimination are based solely on the historical fact that Prairie View A & M has a predominately black student body, and are otherwise without support in the evidence. The lower court recognized this failure of proof and based its decision on the 26th Amendment and the Texas Election Code.

The District Court granted the injunctive relief sought by the United States against Symm, and denied the relief sought against the State of Texas, the Attorney General of Texas, the Secretary of State of Texas, and Waller

County, Texas. The District Court also granted the relief sought by the State of Texas on its cross-claim against Symm, and denied Symm's cross-claim against the State. Symm is the only appellant in this Court. The appellees are the United States, the State of Texas, the Attorney General of Texas and the Secretary of State of Texas.

THE QUESTIONS ARE SUBSTANTIAL

Overview

This is the most recent and most destructive in a series of decisions by lower courts (federal and state—none reviewed by this Court) which have seriously weakened, if not destroyed, any meaningful residence requirement as a prerequisite to voting. The result in these cases is contrary to the philosophy and language of several rather recent opinions by this Court. All of the lower court decisions supposedly implement the 26th Amendment, but the implementation is only indirect at best, while the effect on residence requirements is direct and catastrophic. Most of the decisions, including this one, deal with college students and the difficult question of whether their voting residence is in the college community or elsewhere. The specific connection with the 26th Amendment is rarely discussed by the lower courts and is usually left to the vague assumption that an unknown number of the students are 18-20 years old, which apparently overrides all else, including residence requirements. None of the decisions, including this one, involve denying the right to vote altogether. The only issue is *where* to vote. The answer, according to the lower courts, is in the college community because traveling elsewhere or voting absentee *may* have the *effect* of discouraging an *un-*

determined number of 18, 19 and 20 year olds from voting. This assumed effect should be justified if the applicants are not residents of the college community. The 26th Amendment does not guarantee the vote to non-residents. It is important that a meaningful residence requirement be protected by this Court, and it can be protected without limiting the 26th Amendment.

In the present case, the inescapable and unexaggerated effect of the decision is to judicially determine that anyone who says "I am a resident", is a resident. No further inquiry by the registrar of voters is permitted. This result renders numerous provisions of the Texas Election Code null and void, and the provisions were not even challenged in the suit. The decision is direct federal interference in Texas election procedures, which should be discouraged.

Perhaps the most ironic element of the lower court's decision in this case is the superficial distinctions it draws between the three federal decisions which have dealt with the same Defendant Symm, the same college students, and the same voter registration practices. The two earlier decisions were in favor of Symm and nothing has changed since then. The doctrines of *res judicata* and *stare decisis* should control this case but they did not prevail before the lower court.

The foregoing overview will be discussed in more detail in the remaining sections of this Statement.

A Meaningful Residence Requirement Is Vital to the Electoral Process

In *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775 (1965) the Court struck down a provision of the Texas

Constitution which prohibited military personnel from voting in any election in the state so long as such person was in the military. The conclusive presumption of non-residence was considered by the Court to be overbroad and unnecessary in reaching the legitimate end of registering only bona fide residents of the community. The Court repeatedly supported residence as a requirement for voting. "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. . . . We stress—and this is a theme to be reiterated—that Texas has the right to require that all military personnel enrolled to vote be bona fide residents of the community. But if they are in fact residents, with the intention of making Texas their home indefinitely, they, as all other qualified residents, have a right to an equal opportunity for political representation." 380 U.S. at 91-94, 85 S.Ct. at 777-779. The opinion by Mr. Justice Stewart recognized, without criticizing, that residence in Texas has always required a freely exercised intention of remaining within the State and that the declaration of voters concerning their intent to reside in the State and in a particular county is often not conclusive, but is considered with the actual facts and circumstances. It also recognized that particular categories of citizens, such as students at colleges and universities in Texas, "present specialized problems in determining residence". 380 U.S. at 95, 85 S.Ct. at 779. In the concluding paragraph of the majority opinion, the Court pointedly states: "We emphasize that Texas is free to take reasonable and adequate steps, as have other States, to see that all applicants for the vote actually fulfill the requirements of bona fide residence."

Carrington v. Rash was repeatedly cited and approved in *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), which held that durational residence requirements violated the 14th Amendment. The Court did not, however, eliminate bona fide residence as a requirement for voting. "As already noted, a State does have an interest in limiting the franchise to bona fide members of the community." In discussing *Carrington v. Rash*, the Court states: "Since 'more precise tests' were available 'to winnow successfully from the ranks . . . those whose residence within the State is bona fide', conclusive presumptions were impermissible in light of the individual interests affected". 405 U.S. at 351, 92 S.Ct. at 1007. The opinion by Mr. Justice Marshall also refers to "such objective indicia of bona fide residence as a dwelling, car registration, or driver's license." 405 U.S. at 352, 92 S.Ct. at 1008. Symm is using "more precise tests" and "objective indicia of bona fide residence" to winnow nonresidents from the ranks.

In *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973), *cert. denied*, (1974), which the lower court says controls this case, the court *only* invalidated the statutory presumption that students were not residents of their college communities (Texas Election Code art. 5.08(k)). The court did not reverse the presumption or hold that college students were automatically entitled to registration in the county where they lived when attending college. In fact, the opinion states:

> "Texas has unquestioned power to restrict the franchise to bona fide residents. Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). Indeed, such a restriction 'may be neces-

sary to preserve the basic conception of a political community . . ." 482 F.2d at 1232.

It is important to note that *Whatley* is not entirely consistent with *Carrington v. Rash.*

Article 5.02 of the Texas Election Code provides that a person must be a resident of the state, eighteen years of age or older, and have complied with the registration requirements of the code to be a qualified voter. It further provides that "[n]o person may vote in an election held by a county, municipality, or other political subdivision unless he is a resident of the subdivision on the day of the election; and, except, as expressly permitted by some other provision of this code or another statute of this state, no person may vote in an election precinct other than the one in which he resides." Article 5.10a provides that "[a] person is entitled to register as a voter in the precinct in which he has his legal residence (i.e., domicile), as defined in Section 40 of this code (Article 5.08, Vernon's Texas Election Code) . . ." It continues that "no person may vote at any election unless he fulfills all the qualifications of an elector for that election."

Article 5.08 directs that:

> "(a) As used in this code, the word 'residence' means domicile; i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence.
>
> (b) For the purpose of voting, residence shall be determined in accordance with the common law rules as enunciated by the courts of this state and the following statutory rules, but in case of a conflict, the statutory rules shall control.

> (c) A person shall not be considered to have lost his residence by leaving his home to go to another place for temporary purposes only.
>
> (d) A person shall not be considered to have gained a residence in any place to which he has come for temporary purposes only, without the intention of making such place his home."

The remaining subsections (e) through (l) describe residence presumptions for various groups or classes of people, including married men and women and military personnel.

Article 5.09a designates the county tax assessor-collector (Symm) of each county as the registrar of voters in that county. It then provides that "[t]he registrar of voters shall be responsible for the registration of voters . . ."

Article 5.18a relates to change of residence and cancellation or transfer of registration. In this context Subdivision 5(a) provides that "the registrar may utilize any means available to determine whether a registered voter's current legal residence may be other than that indicated as the voter's legal residence on the registration records." Subdivision 6 authorizes the registrar to accept and use forms other than those prescribed by the Secretary of State in making the determination. To say the least, it would be a curious situation to permit the use of a questionnaire in the context of a change of residence but require the much more cumbersome challenge procedure of Article 5.17a in the context of the initial application for registration. Under Article 5.17a any person applying for registration may be challenged by the registrar if the officer taking the application is not

satisfied as to the applicant's entitlement to registration. The article also provides for an expedited appeal to the state district court of the county from a refusal to register. Article 5.17a and 5.18a are in pari materia and should be read together to permit the use of the questionnaire at either stage of the registration process.

The United States does not challenge the foregoing provisions of the Texas Election Code and does not challenge the right to, and need for, bona fide residence as a prerequisite to voting.

Residence is defined in Article 5.08 of the Texas Election Code, which was quoted earlier, and reference is made to the common law for additional clarification. How have the Texas courts construed the term? *Mills v. Bartlett,* 377 S.W.2d 636 (Tex. Sup. 1964) is usually cited when the meaning of the term "residence" is discussed. It was a suit brought by a candidate for the office of County and Criminal District Attorney of Van Zandt County to enjoin the Democratic Executive Committee from placing the name of another candidate for the same position on the ballot. It was alleged that Bartlett (the second candidate) did not meet the residential requirements of the Election Code. The Texas Supreme Court addressed the issues in the following language:

> "The term 'residence' is an elastic one and is extremely difficult to define. The meaning that must be given to it depends upon the circumstances surrounding the person involved and largely depends upon the present intention of the individual. Volition, intention and action are all elements to be considered in determining where a person resides and such elements are equally pertinent in denoting the permanent residence or domicile. Owens v.

> Stovall, Tex. Civ. App. 64 S.W.2d 360, writ refused; Prince v. Inman, Tex. Civ. App., 280 S.W.2d 779, no writ history; In re Garneau, 7 Cir., 127 F. 677, 679.
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> * * * * * *
>
> Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue." 377 S.W.2d at 637.

Interestingly, Bartlett, the candidate whose residence was challenged, was a law student at Baylor University in Waco, but the court held that his residence was at Canton in Van Zandt County, because when he left there after a one or two day visit, it was for a temporary absence (to complete law school) with a fixed intention to return. The court did not hold and it was not urged that Bartlett ever became a resident of Waco where he attended college.

In *Guerra v. Pena,* 406 S.W.2d 769 (Tex. Civ. App.—San Antonio 1966, no writ), the court quotes the following rule from earlier Texas cases: "A removal to divest one of his right to vote must be accompanied by an intent to make a new domicile and quit the old. Mere removal, coupled with an intent to retain the original domicile and return to it, will not constitute a change." 406 S.W.2d at 776.

In applying this rule, the court held that migrant workers who maintained a permanent residence in a precinct and were gone part of the year because of their work, continued as residents of such precinct. Similarily,

teaching school in another county, or working in a shipyard while waiting for a job in the subject county, or working part of the year in another state on construction jobs, did not change the voting residence of the individuals involved since there was no evidence of an intent to make a new domicile and quit the old. In contrast, evidence of intent to quit the old and make a new domicile was present with respect to a single girl, 27 years of age, who had worked over a year in a factory in Houston, and a divorced man who had worked full-time for a radio shop in Evanston, Illinois, for the last one and one-half years. These two single people only returned on holidays to visit their parents.

The Texas court was searching for the same objective indicia of residence as Symm in this case. The intent to make a place one's home and no plans to move or return elsewhere in the foreseeable future. The objective indicia with regard to the migrant farm workers, school teachers and construction workers showed a temporary absence (whether for six months or four years) because there was no intent to remain at the new place, rather an intent to return to the old. The objective indicia for the two single people showed the opposite intentions. Full-time employment is not usually approached with the idea of changing at a foreseeable point in the future as is college. Obviously, no one can absolutely predict the future or express another's subjective thoughts with complete accuracy. But we can make the best effort possible by considering all of the objective indicia, as well as the statements of the individual, which is exactly what Symm is doing. The objective indicia for many dormitory students at Prairie View A & M show a temporary, educational relocation and no intent to make a new home.

Most people who leave home to go to college consider the move in the limited context of completing an education and have no intention of making their school address their home after the temporary schooling process. It is immaterial whether "temporary" means one day or four years. What is important is no intention of leaving in the foreseeable future—after college.

In *Jordan v. Overstreet*, 352 S.W.2d 296 (Tex. Civ. App.—Beaumont 1961, no writ), the court states that: "Whether a person is a resident of a district or not is distinctly one of intention and of fact. (citing case) Even though he may be temporarily out of the district, if his intention is to return, it is generally held that he is a qualified voter in the district." (citing cases) 352 S.W.2d at 300. Removal for medical attention and recuperation were held not to cause a change of voting residence.

McBride v. Cantu, 143 S.W.2d 126 (Tex. Civ. App.—San Antonio 1940, no writ) repeats the rule that the testimony of a witness as to his intention is not necessarily controlling on the issue of residence, but is an element which may be considered by the authority authorized to determine the fact issues. In *Stratton v. Hall*, 90 S.W.2d 865 (Tex. Civ. App.—El Paso 1936, writ dism'd), the court says: "While declarations of voters are generally admissible to show residence, such declarations are not controlling if the actual facts and circumstances justify a contrary conclusion." (citing cases). 90 S.W.2d at 866.

In the present case, the District Court relied on the activities of other tax assessor-collectors across the State of Texas as evidence of the meaning of residence. 445 F. Supp. at 1257. The comparison between counties only

clouds the true issues in the case. Under the Texas Election Code, Mr. Symm cannot control the other tax assessor-collectors and they cannot control him. The uniform standard in Texas in residence, as defined by the Texas Election Code, and Mr. Symn makes a conscientious effort to implement that standard. 82.85% of the tax assessor-collectors who were deposed by the United States testified that they would not register an applicant as a voter if they knew that his or her good-faith residence was in another county. 84.28% testified that they knew they had a satutory duty to register as voters only those applicants who were good-faith residents of the county. 87.17% knew they had a statutory right to question an applicant concerning his or her good-faith residence, and 88.57% knew they had a statutory right to challenge an applicant who was not a good-faith resident of the county. 87.14% knew that the term "residence" is defined by the Texas Election Code. We are not suggesting that these individuals are trying to violate the law. They are simply not exercising their recognized statutory authority to its fullest extent. A common reason for making no effort to determine residence was lack of manpower and logistical impossibility. Will this Court tell Mr. Symm he can no longer obey the Texas laws simply because no one else does? As with the definition of residence, the United States is suggesting that this Court should redefine the obligations and authority of voter registrars in Texas although the United States has not challenged the present source of their obligations and authority—the Texas Election Code. The effect of the United States' argument is a challenge to the statutory election system in Texas but without pleadings, arguments or evidence as to the validity of the various provisions.

A bona fide residence requirement unintentionally, but inescapably, affects an indeterminable number of students living in the dormitories at Prairie View A & M University because they often have not and could not meet the definition of residence found in the Texas Election Code. This same failure of students to satisfy residency requirements is often found in the context of diversity jurisdiction where "out-of-state students are generally viewed as temporary who are located in the state only for the duration of and for the purpose of their studies." *Lyons v. Salve Regina College,* 422 F. Supp. 1354, 1357 (R.I. 1976). *Accord, Campbell v. Oliva,* 295 F.Supp. 616 (E.D. Tenn. 1968) and *Moss v. National Life and Accident Insurance Co.,* 385 F. Supp. 1291 (W.D. Missouri 1974).

The Waller County (Symm) Registration Process Implements A Meaningful Residence Requirement

The evidence clearly shows that Mr. Symm and his deputies approach every application for voter registration with the question of whether the applicant is a resident of Waller County. (1/31/78 Tr. 18). This question can be answered in any of several ways, each of which is rationally related to determining whether the applicant is in fact a bona fide resident. Some of the indicia of residence are a Waller County native, having family on the registration list, being married with both spouses living in Waller County, personal knowledge or observation of the individual by Mr. Symm or one of his deputies, homestead property on the ad valorem tax roles, automobile on the registration or tax roles. (Tr. 77-79, 84-85). Each of these are objective indicia of the

subjective definition of residence—one's home and fixed place of habitation to which he intends to return after any temporary absence. Without these objective indicia, it would be impossible to implement any meaningful residence requirement—"necessary to preserve the basic conception of a political community" *Dunn v. Blumstein, supra*, 92 S.Ct. at 1004,—because the purely subjective or abstract test of "intention" necessarily could not be applied by anyone except the voter himself, and by him in as many different ways and in reference to as many different places as might suit his convenience at different times. The voter could claim a residence anywhere and the facts would have no bearing upon the matter. *See, Garvey v. Cain*, 197 S.W. 765, 772 (Tex. Civ. App.—Beaumont 1917, no writ). If a person was born in Waller County and is applying to vote there, there is certainly a reasonable indication that he intends to make Waller County his home. If an applicant is married and his spouse also lives in Waller County, there is again a reasonable indication that the couple intend Waller County as their home, and this indication is supported by Article 5.08(f)-(h) of the Texas Election Code. Having family on the registration list is also a reasonable indication of a person's home. It is hard to imagine a better indication of one's home than appearance on the ad valorem tax rolls as a homestead owner. Similarly, automobiles can only be registered in the county of one's residence.

If Mr. Symm or one of his deputies know an applicant through social or business contact, innumerable indicia of residence may be present. For instance, they may be aware that the individual has operated or worked at a local business for years, or has attended the same church

for years, or has lived at the same place for years, and so on. Any one or more of these factors reasonably indicate the home (residence) of the applicant.

In an effort to discredit the foregoing indicia of residence the United States selected 121 registered voters in Waller County for interview by agents of the Federal Bureau of Investigation. The interviewees were selected from Mr. Symm's answers to interrogatories and were people who had been registered as voters without use of the questionnaire or tax rolls. Defendants did not participate in the selection process and had no contact with the interviewees prior to the interviews. (1/31/78 Tr. 87-89). Sixty-six of the interviewees were white (54.55%); forty-nine were black (40.50%), and six were of other race or origin(4.96%). Ten of the interviewees were Prairie View A & M College students at the time they were registered (8.26%), and approximately twenty were eighteen, nineteen or twenty years old at the time of registration. The United States' own reports disprove any claim of racial or age discrimination, or any effort to exclude Prairie View A & M students. These reports and all of the other evidence simply shows that Mr. Symm and his deputies are attempting to the best of their ability to register only residents of Waller County.

The United States asked each of the interviewees "Would Mr. Symm or any deputy know:" (followed by each question on the questionnaire). Obviously, the interviewees could only state whether or not they had personal knowledge about Mr. Symm or any of his deputies, and could only speculate about Mr. Symm's knowledge. Mr. Symm supplied the best evidence of his knowledge at trial through Waller County Exhibit 10, which was an

alphabetical list of the interviewees. Mr. Symm and his deputies placed their initials by the name of each interviewee with whom they were personally acquainted, and about whom they knew all or part of the information inquired into by the questionnaire. (1/31/78 Tr. 89-92, 128). Mr. Symm had previously testified that it was the common practice in the office to discuss an applicant and determine whether anyone in the office had personal knowledge about the person. (Tr. 77-78). Of the 121 interviewees, Mr. Symm and his deputies were personally acquainted with fifty-eight (47.54%). Mr. Symm alone was acquainted with forty-one or 33.61%. (Waller Ex. 10). The United States and the lower court claimed that Mr. Symm or his deputies should have known all of the interviewees, but Waller County Exhibit 11 (the corresponding application of each interviewee) shows that many were registered on some basis other than personal knowledge, such as Waller County native or married.

If an applicant supplies none of the foregoing indicia of residence, Mr. Symm turns to the questionnaire. The questionnaire is not limited to students. (Tr. 85-86). Nine questionnaires sent to nonstudents during 1976 are attached to Mr. Symm's first affidavit. (Waller Ex. 5). This evidence of questionnaires to nonstudents was ignored by the District Court. The United States implied that these were the only questionnaires ever sent to nonstudents, which misinterprets the affidavits and the statements therein. The majority of the questionnaires are sent to students at Prairie View A & M University, not because they are students per se, but because they have not supplied one or more of the initial indicia of residence.

The United States also argued that out of the 545 applicants who were requested to complete the questionnaire

in 1976, only twenty-five were registered without a hearing on the basis of the questionnaire. The United States failed to point out, and the lower court attached no significance to, the fact that 209 of the questionnaires were returned by the post office as "refused" or "unclaimed" and 295 were received but not returned to Mr. Symm's office. (See Waller Ex. 5).

The total information supplied by the questionnaire and application is considered together and no one factor is dispositive or controlling. (Tr. 86, 126). The initial application and the answers to the questions provide a more complete picture from which to determine the residence of the applicant. Again, Mr. Symm and his deputies are searching for objective indicia of the subjective or abstract definition of residence. The subjectivity is on the part of the applicant and is placed there by the Election Code's definition of residence. But in order to implement a meaningful residence requirement, Mr. Symm must search for objective indicia of the subjective intent. Thus, the questionnaire inquires into the present status of the applicant, the duration of his physical presence in the state and county, his statements as to residence, his future plans, ownership of property indicating his home, local memberships and ties with the community, and where he or she lives when not physically present in Waller County. It is hard to imagine a more reasonable method of searching for objective indicia of the subjective intent. The only other alternative is to give complete and controlling weight to the statements of the applicant, without regard to the facts and circumstances. Such an approach is contrary to established Texas law for determining residence and eliminates any meaningful residence requirement. Obviously, many applicants

who state they are residents are in fact residents. But just as obviously, statements as to residence do not establish the home and fixed place of habitation of the individual to which he intends to return after a temporary absence. Virtually none of the applicants would even be aware of the definition of residence, which renders their statements meaningless on the question of whether they fulfill the residency requirement.

Even if the initial application, initial indicia of residence, and questionnaire do not indicate that the applicant is a resident of Waller County, he is not rejected as a voter without first being afforded the opportunity for a hearing. (Tr. 87). A rejected applicant then has the right to appeal to the State District Court, and Mr. Symm so notifies him in writing. No one has ever exercised this avenue of appeal. (Tr. 87).

Both the United States and the lower court expressed justifiable concern about Mr. Symm's statements regarding Article 5.08(k) of the Texas Election Code. We agree that as long as *Whatley v. Clark* is the law, Mr. Symm and his deputies should not presume that students are nonresidents, and we agree that Paragraph 3 of the injunction is proper under the present case law. But an examination of the facts and circumstances clarifies what Symm is actually doing, and there is much more involved than a simple presumption. As with the residency determination itself, controlling weight should not be given to the statements alone. First, there is reasonable and justifiable question in fact whether many of the dormitory students are residents. Historically, many of the dormitory students have not supplied indicia of residence at any stage of the process, and the great majority of them have

not remained in Waller County after graduation since it is a small, predominantly agricultural county with few job opportunities. (Tr. 74-77) Waller County Exhibit No. 9 summarizes the alumni mailing list of Prairie View A & M University. Of 13,038 total alumni, only 473 have mailing addresses in Waller County, which is only 3.63%. 60.89% of those who remained in Waller County are presently registered as voters, which coincides with the usual percentage of registered voters in any population group. These facts raise a justifiable and reasonable question that would exist irrespective of Article 5.08(k). Mr. Symm's testimony (Tr. 81-83, 126-127) and the F.B.I. Reports offered by the United States show that Prairie View A & M students are registered the same as anyone else if they supply the same indicia of residence required of everyone else. The question about their residence does not arise unless the initial indications are missing. (Tr. 83, 127). In fact, the F.B.I. reports show that a larger percentage of Prairie View A & M College students were registered without the questionnaire than actually remain in Waller County after graduation as shown by the alumni mailing list.

It is also interesting to note that the depositions of sixteen key witnesses for the United States (all Prairie View A & M students) show that ten were registered to vote somewhere other than Waller County and at least two others had not applied in Waller County. Sidney Hicks (whose hearsay testimony was relied on heavily by the District Court) testified that he was registered in Navarro County where his parents lived, and he was complaining about the questionnaire rather than a residence requirement. (Prairie View Student Depositions 6-16). Gerard Mosby said he was a resident of *both*

Travis and Waller Counties and sent applications to both. (28-38). Sheila Davis was also complaining about the use of the questionnaire. (50). William Dawn testified "I am a resident of Dallas County." (79). Leon Kirk said his "address at home" was Fort Worth. (172).

From the foregoing it is obvious that Article 5.08(k) simply articulated a question in fact which does not arise, however, unless other indicia of residence are missing. It is also apparent that what we are talking about in this case is the meaning of "residence" in Texas and not whether applicants are black or white, or 18 years vs. 65 years of age.

The Lower Court Is Implementing A Definition Of Residence Different Than The Definition In The Texas Election Code And The State Definition Is Not Challenged In The Suit

The injunction of the District Court provides, among other things, that:

"1. College students of Waller County shall be registered and allowed to vote on the same basis and by application of the same standards and procedures as non-students, without reference to whether such students have dormitory addresses, whether or not they resided in Waller County prior to attending school, and whether or not they plan to leave Waller County upon graduation.

2. The Court recognizes that Leroy Symm has the right under the Texas Election Code to make a factual determination as to whether or not each applicant to vote is a bona fide resident of Waller

County; however, in making this factual determination, Leroy Symm shall not find that a person is a non-resident of Waller County for any of the following reasons:

A. That such person resides in a dormitory at Prairie View A&M University;

B. That such person owns no property in Waller County;

C. That such person is a student at Prairie View University;

D. That such applicant has no employment or promise of employment in Waller County;

E. That such applicant previously lived outside Waller County, or may live outside Waller County after his graduation;

F. That such person visits the home of his parents, or some other place during holidays and school vacations."

* * *

"4. The Tax Assessor, Leroy Symm, shall immediately cease the utilization of the residence standard for students which has been implemented by means of a questionnaire, shall terminate the use of the questionnaire, and shall henceforth register students on the basis of the information contained in the state-approved registration form. as is done elsewhere in Texas, unless Leroy Symm has tangible, recordable evidence (consistent with Paragraph 2 above of this injunctive decree) that such applicant is not a bona fide resident of Waller County. Defendant is enjoined from subjecting Prairie View students to any particular or discriminatory procedure not applied to non-students on a regular basis, such as for example, causing students to visit his

> office and submit students orally to the questioning previously contained in the questionnaire discussed in this Court's Memorandum Opinion."

The inescapable effect of the foregoing provisions is to define residence for voting registration purposes and abrogate Symm's statutory authority and obligations. But the lower court's definition by exceptions does not implement the current definition of residence found in the Texas Election Code—one's home and fixed place of habitation to which he intends to return after a temporary absence. An applicant for voter registration can simply state "[I] am a resident" and will be entitled to registration even though the applicant has no idea of the meaning of residence, and has no idea whether he in fact satisfies the criteria of residence. His statement on residence would, in most cases, be made in good faith, but would still be meaningless since everyone's definition of residence would differ. Any meaningful residence requirement is thereby destroyed. Absolutely nothing in the district court's definition of residence objectively indicates the home and fixed place of habitation of the individual to which he intends to return after a temporary absence. It is impossible to accept this definition and continue to define residence as one's home and fixed place of habitation to which he intends to return after a temporary absence. The United States and the lower court disclaimed any effort to define voting residence for the State of Texas. But that is exactly what the opinion and judgment accomplish.

The United States asked and the lower court held that students in Waller County not be subjected to the presumption contained in 5.08(k) of the Texas Election

Code, or to any other presumption with regard to their voting residence. We agree that as long as *Whatley v. Clark* is the law, students should not be presumed nonresidents simply because they are students. But there is no authority to reverse the presumption or hold that students are automatically entitled to registration without satisfying bona fide residence requirements. Elimination of a presumption of student nonresidence will not eliminate the question in fact regarding the residence of those applicants who do not supply some objective indicia of residence.

The United States and the District Court are in effect saying that identical indicia of residence should be applied to every applicant for voter registration—simply submit an application and you are a resident. But by definition, residence is a subjective and abstract state of mind which can only be indicated by all of the facts and circumstances, including the statements of the applicants. If the meaning of residence is relegated to a mechanical formula, it will necessarily preclude an accurate determination as to one's home and fixed place of habitation to which he intends to return after a temporary absence. The entire purpose for having a residence requirement is thereby frustrated.

It is important to remember that the United States has not challenged, and the lower court has not expressly invalidated, any provision of the Texas Election Code, whether it be the definition of residence or the authority of state and county officials. The missing link in this case is any challenge to the Texas Election Code. The United States in effect asked that some of its provisions be substantially altered or destroyed without even raising

the issue of their validity—and that is what the District Court did. It is patently obvious that the United States and the lower court focused on Mr. Symm and want him to stop using the questionnaire and accept the State voter application form only. The United States and the District Court are effectively urging that the statement of the applicant control residence, though residence as defined in the Texas Election Code depends upon all the facts and circumstances. Considering the doctrines of federalism and comity, this Court should not permit the United States to alter the definition of residence in Texas without an express challenge to the validity of the provisions of the Texas Election Code.

The Other Decisions Which Have Emasculated Residence Requirements

The United States and the lower court relied on cases which are not only distinguishable on the facts, but more importantly, totally ignore State requirements of residence as a prerequisite to voting and the emasculation of such requirements under the guise of enforcing the Twenty-Sixth Amendment.

In *Frazier v. Callicutt*, 383 F.Supp. 15 (N.D. Mass. 1974), on the merits of the case, the court carefully distinguished and approved *Ballas v. Symm, supra*, with the following language:

> "The facts in the Ballas case must be carefully distinguished from those in the case at bar. In Ballas, the additional burden of completion of a questionnaire was imposed upon some prospective voters by the registrar, but this disparate treatment was justified as it was imposed in an impartial manner only upon those applicants for whom there existed

> no alternative channel for securing information as to residency. In the case sub judice, the burden of completing the questionnaire was imposed upon all applicants, but the registrar imposed an additional burden of prosecuting an appeal to the board of election commissioners on some applicants by summarily disapproving the applications of anyone claiming to reside on the campus of Rust or Mississippi Industrial College. This arbitrary distinction alone would perhaps be sufficient to establish the existence of a different standard, but such a finding is conclusively buttressed by the failure of the registrar to refer the applications of members of the 'favored' class, non-students, in accordance with Mississippi law." 383 F.Supp. at 20.

Mr. Symm does not summarily reject college students.

Sloane v. Smith, 351 F.Supp. 1299 (M.D. Pa. 1972) presented an entirely different factual situation from the case at bar. The County Board of Elections summarily rejected the voter registration applications of students. Mr. Symm looks for the same objective indicia of residence for students and non-students. Even with the entirely different fact situation, the *Sloane* court agreed that "[a] State has the power to require that voters be bona fide residents of the relevant political subdivisions and an appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close constitutional scrutiny. [citing *Dunn v. Blumstein* and *Carrington v. Rash, supra*]." *Id.* at 1303.

Ownby v. Dies, 337 F.Supp. 38 (E.D. Tex. 1971) was a consent judgment involving a residency presumption of the Texas Election Code (Art. 5.08), which has since

been repealed. It has as little application to this case as *Whatley v. Clark, supra* should have. Neither case reverses the presumption or holds that a student is automatically a resident for voting purposes of the county where he attends college.

Bright v. Baesler, 336 F.Supp. 527 (E.D. Ky. 1971) involved a discriminatory misapplication of residency statutes by local officials. This same showing cannot be made in the present case. Mr. Symm will register student or non-student applicants if indicia of residence are present. As far as the 26th Amendment is concerned, *Bright* favors the Defendants in the present case, and not the United States. One of the most important problems with the case is that it fails or refuses to follow *Carrington v. Rash, supra,* and makes no effort to distinguish the facts or explain the reasons why *Carrington* should not be followed.

Worden v. Mercer County Board of Elections, 294 A.2d 233 (N.J. Sup. 1972) is clearly distinguishable on the facts. One election official testified that he could recall no instance where he permitted registration by a student whose parents lived outside New Jersey. Students were given written notices which flatly stated that "Students registering at Trenton State College cannot register to vote in Ewing Township". These facts are entirely different from the case at hand.

Jolicoeur v. Mihaly, 488 P.2d 1 (Cal. Sup. 1971) dealt with an irrebuttable presumption of residence not based in fact. We are here concerned with determining the true residence of applicants for voter registration.

In *Shivelhood v. Davis,* 336 F.Supp. 1111 (D. Vt. 1971), the opinion accompanied a preliminary injunction

and the court pointed out that "any decision as to the propriety of a preliminary injunction does not reflect our opinion on the merits of final relief". 336 F.Supp. at 1113. The court also recognized that domicile is larely a question of fact and it would be improper for the court to review the applications of each class member and decide who was entitled to vote. The applicable state statute required that the registration authority determine whether an individual "is domiciled [in the political subdivision] as his permanent dwelling place, with the intention of remaining there indefinitely, or returning there if absent from it." The registration authority interpreted this as requiring applicants to intend to remain permanently. The court decided that this was error because "permanently" and "indefinitely" are not synonymous. Thus, the case is already distinguished from the one at bar because the Texas statutes define residence in a different, although similar, fashion. Moreover, Symm does not require the intent to remain permanently as an element of residence. The Waller County Defendants are carefully following the Texas statutory definition of residence while the registration authority in *Shivelhood* was misinterpreting the applicable statutory definition.

Furthermore, the applicable Vermont statute provided that the written application under oath constituted prima facie evidence of residence and the registration authority was required to place on the voter checklist any person who filed such statement unless the authority had sufficient evidence to rebut the statement. No similar presumption or prima facie case of residence is found in the Texas Election Code.

The opinion went on to hold that students could not be required to fill-out a supplemental questionnaire un-

less all applicants were required to complete the same questionnaire. This coincides with the Waller County procedure of sending the questionnaire to any applicant who has not supplied initial indicia of residence, which procedure was expressly approved in *Ballas v. Symm, supra.*

The opinion in *Shivelhood* continues:

> "We stress, however, that the examples we have listed do not provide an exhaustive list and that we have stated only those factors that the Board may not consider conclusive and have not attempted to indicate those factors which we think would justify a Board of Civil Authority in determining that an applicant was not domiciled in a given town." 336 F.Supp. at 1115.

In contrast, the lower court here has legislated exactly what guidelines and information may be accepted as indicating the residence of an applicant.

The Cause Of Action In This Case Is The Same As Ballas And Wilson

The doctrine of *res judicata* should bar this suit and it is the primary focal point of this section. But even if we assume it does not apply, the doctrine of *stare decisis* cannot be avoided.

The plaintiffs in *Wilson* alleged causes of action under the 14th and 26th Amendments (as does the United States in this case), and under 42 U.S.C. § 1983. Each of the individual plaintiffs in *Wilson* was black and each was a student at Prairie View A & M. Among other things, they claimed that students were singled out for more onerous treatment in determining their residency

and asked that the questionnaire procedure used by Symm be declared unconstitutional and void. (The identical claim and request are made by the United States.) The objectionable questionnaire was attached to the complaint as Exhibit A. It is identical to the questionnaire involved in the present case. It is also important to note that Bob Bullock, then Secretary of State of the State of Texas, was a Defendant in *Wilson*. The present Secretary of State was a Defendant here. The *Wilson* Court held that the argument predicated on the 26th Amendment must fail because the plaintiffs were denied registration on the ground of nonresidency and not on account of age. This holding was predicated on a factual finding that Defendant Symm declined to register plaintiffs after reaching a good-faith determination that plaintiffs were not residents of Waller County. This good-faith determination was based on the same questionnaire and procedures that are challenged in the present suit. It is also interesting to note that while the racial discrimination claim under 42 U.S.C. § 1971 was abandoned, the Court still expressly found no discrimination on the basis of race and added that "the fact that all plaintiffs are Negros is no more than a fortuitous consequence of the fact that the only aggregation of college students in Waller County happens to be at Prairie View, which for historical reasons, has a predominantly Negro student body. It follows that the statutory and decisional law relating to racial disfranchisement is for the most part irrelevant to this suit." *Id.* at 13. The same is true in the present case.

In *Ballas,* causes of action were alleged under the Fourteenth Amendment, and 42 U.S.C. §§1971(a)(2)(A), 1983 and 1988. (The United States relies on §1971[a]). Ballas, a student at Prairie View like Wilson,

brought the action on behalf of all persons who applied to Symm for voter registration but were subjected to different standards, practices or procedures in determining their eligibility. Once again, the claimed "different standards, practices or procedures" equalled the questionnaire. The District Court refused to certify the suit as a proper class action. 351 F.Supp. at 890. The Court of Appeals, however, found a class from the record before it and defined that class as "those who protest the use of questionnaire per se." 494 F.2d at 1172. The claims of that class were held to be rendered moot because of the Court of Appeals' holding that Symm's "use of the questionnaire to determine residency is not a violation of the Equal Protection Clause or the Voting Rights Act" — yet it is precisely this same class on whose behalf the Government brings this suit! The specific prayer of the complaint here is for a declaration that the use of the questionnaire is unlawful and for an injunction restraining "further use of any such questionnaire as a prerequisite to voter registration in Waller County (Complaint, pp. 4, 5). The plaintiff in Ballas attached the questionnaire as Exhibit 3 to his complaint and prayed for a declaration that the questionnaire was unlawful and for an order for mass registration of the class to whom it had been sent. (*Ballas* Complaint, Paragraphs V, X, Prayer, Exhibit 3). Note also that the questionnaire was attached to the Third Amended Complaint (the trial complaint) in *Wilson* as Exhibit A and, again, there was a prayer that the use of the questionnaire by Symm be declared unlawful and that he be enjoined from using it to determine residency (*Wilson* Third Amended Complaint, p. 4).

In each of the three cases, the same basic right and the same basic wrong are alleged with slight variations in

language and approach. The crux of the matter in each case is Mr. Symm's use of the same questionnaire to determine the residence of voter registration applicants who supply no earlier objective indicia of residence. According to each of the plaintiffs, the questionnaire procedure supposedly equals discrimination on the basis of age and race. The majority of the applicants who are asked to complete a questionnaire are students at Prairie View A & M because they have failed to supply any indication of residence in Waller County. Essentially, each case involves an effort to avoid doing anything other than completing an initial application for voter registration. The effort in each case is by or on behalf of the applicants who have been required to submit more than the initial application.

Mere repetition of the same basic cause of action should not be tolerated, whether it is sought through variation in theory or by pleading new facts. *Weiss v. United States*, 227 F.2d 72 (2nd Cir. 1955), *cert. den.* 350 U.S. 936, 76 S.Ct. 308 (1956); *Jones v. United States*, 228 F.2d 52 (D.C. Cir. 1955); *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F.2d 623 (5th Cir. 1940), *cert. den.* 310 U.S. 653, 60 S.Ct. 1101 (1940); *Reiter v. Universal Marion Corp.*, 299 F.2d 449 (D.C. Cir. 1962) (second suit characterized Defendant's conduct as continuous course of conduct rather than isolated acts and demanded injunction); *Moreno v. Marbil Productions, Inc.*, 296 F.2d 543 (2nd Cir. 1961) (from contract to tort); *Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 295 F.2d 362 (5th Cir. 1961) (from breach of contract to breach of anti-trust laws); *Anselmo v. Hardin*, 253 F.2d 165 (3rd Cir. 1958) (in second deportation proceeding, from entry without

visa to entry without inspection); *Miller v. National City Bank of New York,* 166 F.2d 723 (3rd Cir. 1948); *Allen v. Johnson,* 70 F.2d 927 (D.C. Cir. 1934), *cert. den.* 293 U.S. 572, 55 S.Ct. 84 (1934); *Williamson v. Columbia Gas & Electric Corp.,* 186 F.2d 464 (3rd Cir. 1950) *cert. den.* 341 U.S. 921, 71 S.Ct. 743 (1951); *Brickel v. Chicago, B. & Q. R. Co.,* 200 F.Supp. 240 (Wy. 1961) (from conversion of ore to gross negligence in failing to maintain standard established by law for protection of plaintiff's property from unreasonable risk of harm; plaintiffs "cannot separate their grounds to reach the same result via a different theory, keeping their second theory in reserve, in a suit subsequent to the first dry run"); *Estevez v. Nabers,* 219 F.2d 321 (5th Cir. 1955); *Lester v. NBC,* 217 F.2d 399 (9th Cir. 1955), *cert. den.,* 348 U.S. 954, 75 S.Ct. 444 (1955); *Koblitz v. Baltimore & Ohio R. Co.,* 164 F.Supp. 367 (S.D. NY. 1958). It is clear from the foregoing cases that variation in form rather than in substantive grounds does not create a new cause of action for res judicata purposes.

A related principle under the federal law of res judicata is that a party must raise all claims that are a part of the cause of action under adjudication. A final judgment on the merits constitutes an absolute bar to a subsequent action, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. "Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever." *Cromwell v. County of Sac,* 94 U.S. 195, 198 (1876). *Accord, Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 597, 68 S.Ct.

715, 719 (1948); *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 378, 60 S.Ct. 317, 320 (1940); *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 321, 47 S.Ct. 600, 602 (1927); *Aerojet-General Corporation v. Askew,* 511 F.2d 710 (5th Cir.) *appeal dismissed,* 423 U.S. 908 (1975).

Various tests have been suggested for determination of what constitutes a cause of action for purposes of res judicata.

(1) Whether the same right is infringed by the same wrong. *Baltimore S.S. Co. v. Phillips, supra,* 47 S.Ct. 600.

(2) Whether "there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first" judgment. *Moreno v. Marbil Productions, Inc., supra,* 296 F.2d at 545.

(3) Identity of grounds. *Wilson Cypress Co. v. Atlantic Coast Line R. Co., supra,* 109 F.2d at 627 ("not identity of form, but of grounds").

(4) Whether the same evidence would suffice to sustain both judgments. *United States v. Haytian Republic,* 154 U.S. 118, 14 S.Ct. 992 (1894); *Kelliher v. Stone & Webster,* 75 F.2d 331 (5th Cir. 1935).

Aerojet-General Corporation v. Askew, supra, is a recent case which combines the tests.

Under any of the approved tests, this suit is barred. The same right (equal treatment of applicants for voter

registration) is supposedly infringed by the same wrong (more stringent procedure, i.e., questionnaire). *Wilson* and *Ballas* held that Mr. Symm had the right to use the questionnaire for the purpose of determining residency, thereby promoting the integrity of the election process. It is obvious that the judgment in this case impairs his right to use the questionnaire and thereby jeopardizes the integrity of the electoral process in Waller County. The grounds asserted in this case (questionnaire and registration procedures = discrimination on account of age and race) are virtually identical to *Ballas* and *Wilson*. Even the form of the claims are the same (14th and 26th Amendments, 42 U.S.C. 1971). Finally, the same evidence would sustain all three judgments. As Mr. Symm's affidavits show, the procedures and the form of the questionnaire have been the same since 1971. Those identical procedures and questionnaire have twice before been held valid. Superficial distinctions between the three cases should not be upheld.

The Real Parties In Each Of The Three Cases Are Identical

The United States contends it is not bound by *Ballas* and *Wilson* because it was not a party to either suit. But under the Federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interest as to be his virtual representative. In *Chicago R.I. & P. Co. v. Schendel,* 270 U.S. 611, 46 S.Ct. 420 (1926), the Supreme Court approved the foregoing principle with a quotation from an earlier Court of Appeals decision as follows:

"And, conversely, in United States v. Des Moines Valley R. Co., 84 F. 40, 28 C.C.A. 267, where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government. The ground of the decision was thus stated (pages 44, 45 (28 C.C.A. 272)):

'Inasmuch, then, as the government sues for the sole benefit of Fairchild, and for the professed purpose of reinvesting him with a title which he has lost, we are of opinion that, whether the present action be regarded as brought under the Act of March 3, 1887 (24 Stat. 556, c. 376 (Comp. St. Sec. 4895 et seq.)), or as brought in pursuance of its general right to sue, *the government should be held estopped by the previous adjudication against the real party in interest in the state court.* The subject-matter and the issue to be tried being the same in this proceeding as in the former actions, *the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications.* Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co., 12 U.S. App. 320, 325, 55 F. 690, 5 C.C.A. 249. This doctrine was applied by this court in the case of Union Pac. Ry. Co. v. U. S., 32 U.S. App. 311, 319, 67 F. 975, 15 C.C.A. 123, which was a suit brought by the United States under the Act of March 3, 1887, wherein we held that the United States was bound by an estoppel which might have been invoked against the real party in interest if the suit had been brought in his name, because it appeared that the United States had no substantial interest in the controversy, and was merely a nominal plaintiff." 270 U.S. at 619, 46 S.Ct. at 423.

The *Schendel* case arose from an accident on the line of the railway company in Iowa. The employer instituted proceedings under the Iowa Workmen's Compensation law and the Court held that the action was barred by res judicata because of a prior final judgment rendered in the Iowa courts determining that the employee was killed in intrastate commerce. The prior action was brought by the administrator of the deceased employee for the benefit of the surviving widow. Thus, the real party in both cases was the same (the surviving widow). In the present case, the real parties are those applicants for voter registration who are asked to complete the questionnaire, which group is comprised predominantly of students from Prairie View A & M. In *Ballas* and *Wilson*, the same real parties were involved.

Conversely, in *Heckman v. United States*, 224 U.S. 413, 32 S.Ct. 424 (1912), the Court held that the United States had the capacity to maintain a suit to set aside conveyances made by Indian allottees of allotted lands and that the allottees need not be joined. The defendant in that case insisted that, unless the allottees who had executed the conveyances were brought in as parties, he was in danger of being subjected to a second suit by the allottees. Answering that contention, the Court said:

> "But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. (Citing cases) And it could not, consistently with any principle be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to

> cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question." 32 S.Ct. at 434-35.

Ballas and *Wilson* should preclude or control this case.

The Pendent Cross-Claims

The United States sued the State of Texas, the Secretary of State of Texas, and the Attorney General of Texas, in addition to the Waller County Defendants, claiming they had the authority under the Texas Election Code to stop the registration practices complained of. The Secretary of State of Texas originally answered this claim in the following language:

> "This Defendant would show that although the Secretary of State is statutorily designated as the chief elections officer of the State of Texas, that each individual tax assessor-collector of each county of the State of Texas is statutorily empowered and required to administer the voter registration laws of the State of Texas and operates autonomously and independently of the Secretary of State in administering such laws. Each assessor-collector is the administrative authority to determine residency of any applicant for registration, and *the Secretary of State is not permitted by law to substitute his judgment for that of the county assessor-collector.*" (emphasis added)

The answer of the State of Texas and the Attorney General contains almost identical language.

On September 1, 1977, the Secretary of State of Texas changed his position and adopted Emergency Rule

004.30.05.313, which provides "No questionnaire or additional written information shall be required prior to the registration of any applicant for voter registration who has properly completed a voter registration form which has been prescribed by the Secretary of State". Simultaneously, the Secretary of State directed Symm "to discontinue any voter registration procedure which requires an applicant to provide any written information not required by Article 5.13b, Subdivision 1, Vernon's Texas Election Code".

The foregoing emergency rule and directive form the basis of the cross-claims between the State and Symm. The District Court held in favor of the State and enforced the directive by its injunction.

The Texas Election Code, articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a, 5.18a, and *Bullock v. Calvert*, 480 S.W.2d 367 (Tex. Sup. 1972) make it clear that the judgmental residency determination is left to the individual tax assessor-collectors under Texas law, and the Secretary of State cannot, and does not, have the unconstitutional power to abrogate legislative enactments. Additional argument and authorities pertaining to the pendent cross-claims will be presented in a brief on the merits if permitted by the Court.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and of general public importance. It is submitted that this Court should grant plenary consideration, with briefs on the merits and oral argument, and reverse the judgment below and render judg-

ment that the appellees take nothing by their respective claims and cross-claims.

Respectfully submitted,

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Counsel for Appellant

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1688

LE ROY SYMM, *Appellant,*

v.

UNITED STATES OF AMERICA, et al., *Appellees.*

On Appeal From The United States District Court For The Southern District Of Texas

RULE 15 APPENDICES TO JURISDICTIONAL STATEMENT

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

APPENDICES INDEX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 76-H-1681

UNITED STATES OF AMERICA,
Plaintiff,

v.

STATE OF TEXAS, et al.,
Defendants.

(Filed March 27, 1978)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Le Roy Symm, one of the Defendants in the above styled and numbered cause, hereby appeals to the Supreme Court of the United States from the Final Judgment and Injunction entered in this action on the 3rd day of March, 1978.

This appeal is taken pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973bb.

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LE ROY SYMM.

PROOF OF SERVICE

I hereby certify that on the 24th day of March, 1978, one copy of the attached and foregoing Notice of Appeal was deposited in a United States Post Office or mail box, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington D.C. 20530. Another copy of such Notice of Appeal was this day deposited in a United States Post Office or mail box, with firstclass postage prepaid, addressed to Mr. David M. Kendall, First Assistant Attorney General of Texas, Supreme Court Building, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel of record for Defendants-Appellees, State of Texas, John L. Hill, Mark White, and his successor, Steven C. Oaks. I further certify that all parties required to be served have been served.

/s/ MICHAEL T. POWELL
Michael T. Powell
823 Two Houston Center
Houston, Texas 77002
(713) 654-4454

Counsel for Appellant,
LE ROY SYMM

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION No. 76-H-1681

(Filed March 3, 1978)

UNITED STATES OF AMERICA,
Plaintiff

v.

STATE OF TEXAS, et al,
Defendants

INJUNCTION

For the reasons stated in the Memorandum Opinion of February 16, 1978, the Court hereby ORDERS:

1. College students of Waller County shall be registered and allowed to vote on the same basis and by application of the same standards and procedures as non-students, without reference to whether such students have dormitory addresses, whether or not they resided in Waller County prior to attending school, and whether or not they plan to leave Waller County upon graduation.

2. The Court recognizes that Leroy Symm has the right under the Texas Election Code to make a factual determination as to whether or not each applicant to vote is a bona fide resident of Waller County; however, in making this factual determination, Leroy Symm shall not find that a person

is a non-resident of Waller County for any of the following reasons:

A. That such person resides in a dormitory at Prairie View A&M University;

B. That such person owns no property in Waller County;

C. That such person is a student at Prairie View University;

D. That such applicant has no employment or promise of employment in Waller County;

E. That such applicant previously lived outside Waller County, or may live outside Waller County after his graduation;

F. That such person visits the home of his parents, or some other place during holidays and school vacations.

In this connection, if Leroy Symm, in the performance of his duties, determines that he is to make a finding that a person is a non-resident, or not a bona fide resident of Waller County, such determination shall be made on the basis of tangible evidence, consisting of facts or factors other than the six factors listed above. In addition, in the event Leroy Symm makes a determination that any person who claims to be a resident of Waller County, and who has a Prairie View University address, is not a bona fide resident of Waller County, Mr. Symm shall make a written record of the precise, exact tangible evidence upon which he relied in making his determination of non-residency. All records of the type described in the

previous sentence shall be kept in legible form and in a single file in the Waller County Registrar's office where such records can be inspected by the plaintiff in this cause or any other person having a legitimate interest in the examination of such records. Such records shall be maintained for a period of five (5) years after originally made.

No additional inquiry or information shall be required solely because the application form promulgated by the Secretary of State of Texas contains different permanent and mailing addresses or states that the applicant is registered in another Texas county.

3. Students of Waller County shall not be subjected to the presumption contained in Sec. 5.08(k) of the Texas Election Code, or to any other presumption with regard to their voting residence.

4. The Tax Assessor, Leroy Symm, shall immediately cease the utilization of the residence standard for students which has been implemented by means of a questionnaire, shall terminate the use of the questionnaire, and shall henceforth register students on the basis of the information contained in the state-approved registration form, as is done elsewhere in Texas, unless Leroy Symm has tangible, recordable evidence (consistent with Paragraph 2 above of this injunctive decree) that such applicant is not a bona fide resident of Waller County. Defendant is enjoined from subjecting Prairie View students to any particular or discriminatory procedure not applied to non-students on a regular basis, such

as for example, causing students to visit his office and submit students orally to the questioning previously contained in the questionnaire discussed in this Court's Memorandum Opinion.

5. The defendant Tax Assessor of Waller County shall schedule registration and other election procedures pursuant to a time table which will allow students who are bona fide residents of Waller County to register and vote in the elections scheduled for May 6, 1978, and in subsequent elections. Adequate resources and personnel shall be employed by the defendant Tax Assessor, so as to avoid causing student applicants any significant or unusual inconvenience.

6. Defendant Symm may require that all applicable information requested on the application form promulgated by the Secretary of State of Texas be supplied by the applicant, and may refuse registration unless and until all such information is provided. In the event the application form is incomplete and registration is denied on such basis, defendant Symm shall promptly return such incomplete application to the applicant with notice of the reason registration is denied.

7. The entry of this order shall not preclude the State of Texas from altering its voter registration standards so long as said standards are applied on a uniform basis and do not discriminate on the basis of race or age. Any such alteration of uniform standards shall be applied in Waller County and elsewhere without further order of this Court.

8. No relief will be granted with respect to defendants, Mark White, and his successor, Steven C. Oaks, John L. Hill, the State of Texas, and Waller County. It is further ORDERED, ADJUDGED and DECREED that Leroy Symm recover nothing of or from Steven C. Oaks, Secretary of State of the State of Texas, on his cross-claim, and that the State of Texas, acting by and through John L. Hill, its Attorney General, have judgment against Leroy Symm on its cross-claim ordering that Leroy Symm obey Rule 004.30.05.313 of the Rules of the Secretary of State, and that he cease using the written questionnaire with reference to the registration of voters in Waller County.

Taxable costs of court are assessed against those parties who have incurred such costs.

THIS IS A FINAL JUDGMENT.

ENTERED and EXECUTED at Houston, Texas, this the 3rd day of March, 1978.

/s/ JOE INGRAHAM
Joe Ingraham
United States Circuit Judge

/s/ WOODROW SEALS
Woodrow Seals
United States District Judge

/s/ FINIS E. COWAN
Finis E. Cowan
United States District Judge

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UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF TEXAS, Mark White, Secretary of State of Texas, John Hill, Attorney General of Texas, Waller County, Texas, Leroy Symm, Tax Assessor-Collector of Waller County, Texas, Defendants.

Civ. A. No. 76-H-1681.

United States District Court

S. D. Texas,

Houston Division.

Feb. 16, 1978.

United States brought suit to enjoin a Texas voting registrar from refusing to register college dormitory residents unless they established that they intended to remain in the community after graduation. A Three-Judge District Court held that the registrar's practice violated the Twenty-Sixth Amendment.

Injunction issued.

John P. MacCoon, Dept. of Justice, Washington, D.C., Anna E. Stool, Asst. U. S. Atty., Houston, Tex., for United States of America.

David M. Kendall, Jr., First Asst. Atty. Gen. of Texas, Austin, Tex., for State of Texas, Mark White, and John Hill.

Will G. Sears, Michael T. Powell, Sears & Burns, Houston, Tex., for Waller County and Leroy Symm.

Before INGRAHAM, Circuit Judge, and SEALS and COWAN, District Judges.

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MEMORANDUM OPINION

Prior Litigation, Legislation and Administrative Action Relating to Voter Rights of Prairie View Students

The case which controls this controversy is *Whatley v. Clark,* 482 F.2d 1230 (5th Cir. 1973) (hereinafter *"Whatley"*). That case helds that the statutory presumption of non-residency contained in Article 5.08(k) of the Texas Election Code is unconstitutional. Much of the previous litigation relating to voting rights in Waller County is rendered inapplicable by *Whatley;* however, that prior litigation, in the interest of completeness, should be reviewed.

The two previous cases in which the courts have grappled with the problem of Prairie View A & M University (hereinafter "Prairie View") student voters are *Wilson v. Symm,* 341 F. Supp. 8 (S.D. Tex. 1972) and *Ballas v. Symm,* 351 F. Supp. 876 (S.D. Tex. 1972); 494 F.2d 1167 (5th Cir. 1974) (herinafter *"Wilson"* and *"Ballas"*).

Wilson was an effort by five Prairie View students to compel Tax Assessor-Collector Symm to register them to vote. The case was never certified as a class action pursuant to Rule 23, Fed. R. Civ. Proc. *Wilson* was decided before *Whatley v. Clark,* 482 F.2d 1230 (5th Cir. 1973), and the court's holding in *Wilson* is predicated upon the court's conclusion (later proved incorrect by *Whatley*) that Article 5.08(k) was constitutional. The court held that the function of the challenged questionnaire was to provide student applicants a means by which to overcome a statutory presumption of non-residency. Since *Wilson v. Symm* was predicated upon an

incorrect assumption concerning the constitutionality of Article 5.08(k), it now has limited authoritative force.

Wilson was decided in the spring of 1972. In the fall of that same year, the Honorable James Noel decided the case of *Ballas v. Symm,* 351 F. Supp. 876 (D.C. Tex. 1972). The trial court decision in *Ballas,* like the decision in *Wilson,* was decided before the appellate decision in *Whatley,* and was similarly predicated upon an assumption that the statutory presumption of 5.08(k) was constitutional.

Ballas, a white student at Prairie View, complained of Symm's practice of requiring students to complete the questionnaire attached to this opinion as Exhibit A [Appendix]. The *Ballas* case was never certified as a class action pursuant to Rule 23. The court specifically declined (351 F. Supp. at 880) to certify the case as a class action.

The trial court's opinion in *Ballas v. Symm,* 351 F. Supp. 876, at 877, discusses the fact that on October 2, 1972, the United States District Court for the Eastern District of Texas (Judge Wayne Justice) decided *Whatley,* holding at the trial court level that the statutory presumption contained in Article 5.08(k) was unconstitutional. The opinion also discusses the fact that on October 3, 1972, the Chief Election Officer of the State of Texas, Secretary of State, Robert Bullock, issued a bulletin to all voting registrars, advising that:

> "No county registrar may require any affidavits or questionnaire in addition to the information required on the application for a voter registration certificate."

The trial court in *Ballas* held that this bulletin and Bullock's acceptance of Judge Justice's decision in *Whatley* was:

> "Utterly lacking in candor or credibility; legally incorrect; misleading; in excess of his statutory authority, and irrelevant." 351 F. Supp. at 888.

Subsequent to Judge Noel's decision in *Ballas* in November of 1972, the Fifth Circuit decided *Whatley* in August of 1973, holding that Bullock's legal position, as stated in his memorandum, and Judge Justice's trial decision in *Whatley* were in fact legally correct and that Article 5.08(k) was unconstitutional.

In 1975, in an action which the State of Texas here contends was taken in response to Judge Noel's criticism of Secretary of State Bullock in *Ballas,* the 64th Legislature of the State of Texas passed a statute, amending the Texas Election Code. The Texas Election Code, as modified by the 1975 amendments reads:

> "Art. 1.03. Secretary of State as Chief Election Officer.
>
> "Subdivision 1. The Secretary of State shall be the chief election officer of this state, and it shall be his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws. In carrying out this responsibility, he shall cause to be prepared and distributed to each . . . county tax assessor-collector, . . . detailed and comprehensive written directives and instructions relating to and based upon the election laws as they apply to elections, registration of electors, and voting procedures which by law are under the direction and control of each such respective officer. Such directives and instructions shall include sample

forms of ballots, papers, documents, records and other materials and supplies required by such election laws. He shall assist and advise all election officers of the state with regard to the application, operation and interpretation of the election laws.

"Subdivision 2. At least 30 days before each general election, the Secretary of State shall prescribe forms of all blanks necessary under this Code, and shall furnish same to each county clerk.

* * *

"Art. 5.02. Qualification and Requirements for Voting.

* * *

(b) All citizens of this state who are otherwise qualified by law to vote at any election of this state or any district, county, municipality, or other political subdivision shall be entitled and allowed to vote at all such elections. The Secretary of State shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General."

Although there is no way to determine the legislative history of an Act of the Texas Legislature with certainty, the State of Texas contends (and it seems reasonable to assume) that these statutory changes were enacted in reaction to Judge Noel's statements critical of Bullock in *Ballas.*

The Fifth Circuit Court of Appeals in *Ballas v. Symm,* 494 F.2d 1167 (5th Cir. 1974) affirmed the trial court decision, emphasizing, however, two significant facts:

1. The use of the form itself did not violate the federal Constitution because the determination of whether or not an applicant was a voter was not made on the basis of the form alone, but on the contrary, was made after a hearing; and
2. There was no proof that the questionnaire itself was used as a device to prevent legal residents from voting.

The Fifth Circuit opinion by Circuit Judge Roney is drawn with precision and decides a very narrow issue, as stated at 494 F.2d at 1168:

> "The precise issue which this suit seeks to determine is whether use of a questionnaire to assist in residence determination by a voter registrar is a violation of the 14th Amendment Equal Protection Clause, and the amended 1964 Voting Rights Act because only some voter applicants, but not all, were required to complete the questionnaire."

The Fifth Circuit, as did the trial court, emphasized that the case was not a class action and not properly regarded as a class action. (See 494 F.2d at 1169).

The case at bar was filed on October 14, 1976 and on March 15, 1977, this court, in an unpublished Memorandum Opinion, overruled defendant Symm's motion for summary judgment. Symm's motion for summary judgment was predicated upon a theory that the Fifth Circuit opinion in *Ballas* was res judicata and barred the United States from relitigating the controversy relating to Waller County voting rights. The court held that res judicata was not applicable because of lack of identity of parties and because the cause of action asserted by the Government herein differs from that asserted by *Ballas.*

In reaching its conclusion, the court relied upon *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977); *Black Voters v. McDonough*, 421 F. Supp. 165 (D.C. Mass. 1976). This court in its opinion of March 15, 1977, however, decided that the doctrine of abstention was applicable. This court's decision to abstain was reversed 15 days later in a one paragraph opinion. Thereafter, the factual record which is discussed below was developed in a series of hearings.

Pleadings and Assertions of the Present Parties

The complaint of the United States alleges that defendant Symm, by virtue of certain practices, including the use of a unique form, has abridged the right of Prairie View dormitory residents to vote in violation of their rights under the 14th, 15th and 26th Amendments to the Constitution of the United States. In oral argument, the United States has consistently contended that its cause of action is considerably broader that the cause asserted in *Ballas, supra,* in that the United States does not object to the use of the Symm form *per se,* but contends that the form is merely a part of a more pervasive pattern of conduct which has the effect and the intent of depriving dormitory students at Prarie View of their rights under the 14th, 15th and 26th Amendments.

The claims of the United States are asserted against Symm, the County Commissioners of Waller County, the State of Texas, Mark White, Secretary of State of the State of Texas, and John Hill, Attorney General of the State of Texas.

Hill and White answer by alleging that they have done everything within their power to guarantee the dormitory students of Prairie View their rights under the 14th, 15th and 26th Amendments and also assert that the use of the Symm questionnaire has had the practical effect of discouraging applicants for registration from completing the registration process. John Hill also asserts a cross-claim against Leroy Symm, stating that on September 1, 1977, the Secretary of State adopted Emergency Rule 004.30.05.313 prohibiting the use of questionnaires of the type employed by Symm. John Hill asserts that under the Texas Election Code, the Secretary of State had authority to issue this Emergency Rule, and prays that this court enjoin Symm from continuing to use the questionnaire contrary to the directions of the Emergency Rule adopted by the Secretary of State.

In answer to the cross claims asserted by White and Hill, Symm has filed a cross-claim against White asserting that White's Emergency Rule 004.30.05.313 is contrary to the laws of the State of Texas and in excess of the legal authority of the Secretary of State, and requesting this court to enter a Declaratory Judgment finding that White had no authority to issue (1) Emergency Rule 004.30.05.313 and (2) a letter of September 1, 1977 to Mr. Symm prohibiting Symm from continuing to use any voter registration procedure which required an applicant to provide any written information not required by Article 5.13b, subdivision 1, of the Texas Election Code.

In oral argument, counsel for Symm requested the court to invoke its pendent or ancillary jurisdiction for the purpose of entering a Declaratory Judgment to the effect that White has no authority to issue the Emergency Rule and the letter in controversy.

EVIDENCE IN PRESENT CASE

Testimony of Prairie View Students and Administrators

Sidney Hicks is a full time student at Prairie View. He resides in the dormitory and is active in student affairs. Before commencing college, he lived in Navarro County, Texas.

Students at Prairie View commenced their efforts to vote in Waller County in 1966. The most recent drive to encourage students to vote was in March of 1976. In March of 1976, Mark White, the Secretary of State, and a number of his deputies visited the campus to assist students to register and vote. Hicks believes that White's staff was extremely helpful, but he cannot testify that White did everything possible to aid the students in their desire to register and vote in Waller County.

During the drive to register students in the spring of 1976, Hicks, accompanied by others, visited Mr. Symm to discuss with him the desire of many Prairie View students to register and vote in Waller County, and their belief that they were legally entitled to do so. Symm explained to Hicks and his companions that allowing students to register and vote would not be fair to permanent residents of Waller County who had devoted their entire lives to the county and who would be present in the county long after the students were gone. Symm further explained that as he viewed the matter, students and military personnel fell into the same category and neither were entitled to be routinely registered on the same basis or by the same procedures as "permanent" residents.

The Town of Prairie View is located within Precinct 12 of Waller County. In the 1976 election, Hicks became a

candidate for city councilman for the town of Prairie View and was elected, even though the bulk of the students at Prairie View University were not registered voters. He attributed his victory at the polls to the fact that the registered voters in Prairie View approved of his efforts to assist and encourage qualified students to register and vote.

In an effort to register and vote in Waller County, Hicks filled out the Symm questionnaire. He stated in the questionnaire that he was a resident of Prairie View, lived in the dormitories, was a full time student, returned to his parents' home in Nacogdoches on holidays and in the summers, spent approximately 75% of his time at Prairie View, and regarded Prairie View as his residence while he was pursuing his studies. He was not allowed to register in Waller County and in the 1976 election was able to vote only by driving approximately 300 miles to his parents' home in Navarro County.

Hicks, throughout, has been aware that he and other students may have a legal right to request federal registrars to come to Waller County to assist in the registration of students. He states that he and other students have refrained from pursuing this remedy because they did not wish to create hard feelings, hoped to create a feeling of amity in Waller County, and to make Waller County the best county in the state.

Hicks testified without equivocation that dormitory students at Prairie View were simply not allowed to register in Waller County.

Hicks testified that during the voter registration drive of 1976, he, through the student organization in which he was active, kept detailed records concerning the number

of applications to vote by students. He testified that over 1,000 application cards were forwarded to Mr. Symm. In one of his conferences with Hicks, Symm told Hicks that only 700 of these were received. Only 27 students were registered to vote, and none of those 27 were dormitory students. All of the 27 were either Waller County natives or were married students.

Three other Prairie View students testified. All testified that they were dormitory residents, full time students, and had no definite intention concerning returning to the counties of their parents' homes when they completed their studies. All testified that they had filled out Symm's form but had not been allowed to register and vote. One of them had been allowed to register and vote, after refusal by Mr. Symm, in the county of his parents' residence. One other had not been successful in registering in the county of his parents' residence, and was not able to vote in the 1976 presidential election.

Mr. C. A. Thomas, the Registrar of Prairie View A & M University, testified that undergraduates from outside Waller County were required to live in the dormitory when dormitory space was available; that normally the dormitories had space for all students; that Prairie View freshmen were normally in the 17-19 age bracket; that all dormitory students were black; and that as of October 1976 there was a total of 2,918 students living in the dormitories.

Testimony of University of Texas Students and Registrars from other Counties

Students from the University of Texas testified that in Travis County students were routinely registered like other voters, simply by filling out the state prescribed

registration form and furnishing the information there, and were not subjected to further or special inquiry.

The United States introduced in evidence the testimony of 70 registrars of voters, located in virtually every Texas county containing an institution of higher learning. None of the registrars of the 70 other Texas counties containing institutions of higher learning follows Mr. Symm's procedure; none applies the presumption contained in Article 5.08(k) and declared unconstitutional in *Whatley;* and none subjects students to any more rigorous scrutiny than other applicants for voting. All feel that they are applying the law of the state properly. All state that they would not register a potential applicant, if they knew he was not a resident of the county, but that they do not have the personnel or manpower to conduct detailed inquiries with reference to each applicant.

Testimony of Representatives from Office of Secretary of State

Mark White, Secretary of State of the State of Texas, and Leroy Beck, a deputy Secretary of State, testified that during the period from February, 1976 until October, 1976, Mr. White or his deputies made a total of ten visits to the Prairie View campus for the purpose of educating students concerning their rights and attempting to discuss the Waller County situation with Mr. Symm.

White testified that he visited Symm and explained to him that Article 5.08(k) had been declared unconstitutional in *Whatley*. White also testified that he and his deputies visited Prairie View campus on numerous occasions, attempting to explain the law to students, and attempting to assist students to register in whatever county the student felt was in fact his residence.

White testified that he told students that they could not automatically be registered where they were students but were required to establish residence in the place where they wished to vote.

White also testified that in September, 1977, he issued the following directive:

Suffrage
Use of Questionnaires or other
Written Information in
Qualifying Registrants
004.30.05.313

The Secretary of State has adopted Emergency Rule 004.30.05.313. The rule states that no questionnaire or additional information may be required of an applicant who has properly completed a voter registration application. The rule is necessary to meet administrative problems concerning voter registration for the November 8, 1977 Constitutional Amendment Election, and for this reason is adopted as an emergency rule.

This emergency rule is adopted under the authority of Articles 1.03, 5.02(b), and 513a, Vernon's Texas Election Code.

.313. No questionnaire or additional written information shall be required prior to the registration of any applicant for voter registration who has properly completed a voter registration form which has been prescribed by the Secretary of State.

Issued at Austin, Texas, on September 1, 1977.

/s/ MARK WHITE
Secretary of State

Testimony of Leroy Symm

Mr. Symm was first elected Tax Assessor-Collector of Waller County in 1956 and has served continuously since that time.

Commencing about 1966, there were efforts by persons whom Mr. Symm regards to be non-residents to vote, and at that time he instituted the procedure of having each person whose good faith residence he questioned, complete an affidavit. There was some objection to these affidavits, and consequently in about 1970, he ceased the use of the affidavit and instead started to use the "Questionnaire," a copy of which is attached to this opinion as Exhibit A (hereinafter the "questionnaire").

One of the reasons for Symm's use of the questionnaire is his belief that Article 5.08(k) of the Election Code is applicable. Symm stated that he had read in the newspaper that an opinion from some court declared Article 5.08(k) unconstitutional, but that he did not change his practices after receiving this information and that he, himself, in making residency determinations, still applies the presumption set forth in Article 5.08(k) and instructs his deputies to do the same. His testimony in this connection is confirmed by the testimony of his deputies, who state that they also, by virtue of instructions from Symm, apply the presumption decreed in Article 5.08(k).

Symm states that he has received Mark White's "Emergency Order" and has discussed this order with White. In his discussions with White, Symm questioned White's authority to issue the emergency directive. Mr. Symm states that he will continue to use the form until this court determines whether White has the authority to issue his directive, and that he will comply with the

order of this court in connection with the determination of White's authority.

Mr. Symm, in his deposition taken on January 16, 1978, testified definitely, without equivocation, in response to numerous questions, that he still applies the presumption contained in Article 5.08(k). At the hearing held before this court on January 31, 1978, he forthrightly and candidly repeated this testimony.

Symm's basic procedure is as follows: A very large number of persons who apply to register to vote are personally known to Symm or his deputies as being residents of Waller County. These persons are routinely registered, upon filing out the state form, without further inquiry. A second category of persons exists who are also registered routinely and without further delay. This second category consists of persons who are not personally known to Symm or his deputies as residents of Waller County, but who are listed on the tax rolls as owning property in Waller County and whose address on the tax rolls shows an address in Waller County. A third category consists of those who did not fit within either of the above categories, and those persons are issued the questionnaire which is attached to this opinion as Exhibit A [Appendix].

Upon examining the questionnaire, Symm either registers the persons as voters, or gives them notice that a hearing has been set to hear evidence and make a determination as to their residency. Experience demonstrates that a very high percentage of the persons for whom hearings are set do not appear, and that a majority of the persons who appear for hearings are not registered.

With reference to the third category (i.e., non-property owners not known to Symm or his deputies), Mr. Symm, in making his residency determination, does not rely upon a single factor, but instead, considers the entire factual background. In this connection he considers the marital status of the applicant, the question of whether he is employed in Waller County, the question of whether he has family in the county, the question of whether he is a Waller County native, and the question of whether or not the place where he lives is a permanent address, as distinguished from a temporary residence. He states that generally students are not regarded by him as residents unless they do something to qualify as permanent residents, such as marrying and living with their spouse or obtaining a promise of a job in Waller County when they complete school. He does not regard a dormitory room as a permanent residence, and regards a permanent residence, only as a place with a refrigerator, stove and furniture.

Mr. Symm has no information concerning procedures followed in other counties and no interest in those procedures.

With reference to the voter registration drive in 1976, Mr. Symm received 898 applications for voter registration which bore a permanent mailing address at Prairie View, Texas. Of these 898 applications, 79 were registered as voters on the basis of Symm's personal acquaintance and knowledge that the applicants were good faith residents of Waller County. Thirteen of these 898 were registered on the basis of examination of ad valorem tax rolls. 101 applicants were challenged and hearings set. Of the 898, 545 were requested to complete the questionnaire by certified or registered mail. 209 of

the Symm mailings (which requested the addressees to fill out his questionnaire) were returned "refused" or "unclaimed." 295 of the applicants received the questionnaire but did not return it to Symm's office. 78 of the applicants completed the questionnaire and 25 of these were registered as voters without a hearing on the basis of the total contents of the questionnaire. 238 notices of hearing were sent wherein the applicants did not appear for the hearing. Thirty applicants who were sent notices of hearing appeared, and ten were registered as good faith voters after a hearing.

In summary, of 545 potential voters who were sent the questionnaire, a total of 35 were registered as voters.

Mr. Symm believes that students and servicemen fall within the same category, and that neither are residents, as a general rule, of the place where they are stationed or attending school, and in making this determination of residency, he applies this assumption and the Article 5.08(k) presumption.

Symm testifies that a number of the questions on his questionnaire are not really very significant in enabling him to make a determination concerning residence. For example, the length of time a student has been at Prairie View, the length of time he has resided in Texas, and the question of whether or not he is employed, are of no particular significance; however, the question concerning property ownership is very significant, as is the question concerning whether the student has been promised a job in Waller County or intends to reside in Waller County "indefinitely." Symm agrees that "indefinite" is an indefinite word, but it is inferable from his testimony that he attempts to make a determination as to whether

or not a student has an intent and a reasonable expectation of remaining permanently in Waller County upon completion of his studies. In this connection, Symm emphasizes that very few students continue to reside in Waller County upon graduation because of limited job opportunities and supports this view by reference to alumni statistics revealing that only about 2% of Prairie View alumni reside in Waller County.

The question concerning whether or not an applicant has an intent to remain "indefinitely" in Waller County is a question which he asks only of those who are required to fill out the questionnaire. He does not ask persons with jobs in Waller county whether they intend to remain in the county "indefinitely."

Students at Prairie View whose parents live in Waller County are treated differently from other students. These Prairie View students, the children of Waller County natives, are registered without question. In addition, married students, even if they reside in the dorms with their spouses, would be routinely registered, but not single students.

Tests of Symm's Perception of Non-Discriminatory Use of Questionnaire

Both the State of Texas and the Commissioners of Waller County agree that Mr. Symm sincerely perceives that his use of the questionnaire is non-discriminatory and that it is issued only to persons whom Symm does not know personally or who do not appear as property owners on the tax rolls of Waller County. This perceived assumption was accepted by both trial and appellate courts as having been established conclusively on the

basis of the record developed in *Ballas*. The record in *Ballas* was obviously less comprehensive than the record developed in the case at bar.

In an effort to test the accuracy of Symm's perception, the United States, plaintiff herein, has subjected this perception to the test described below.

In answers to interrogatories served upon him pursuant to Rule 33, Fed.R.Civ.Proc., Mr. Symm attached the voter registration forms of all Waller County voters who were registered on the basis of his personal knowledge. After these interrogatories were answered, investigators for the United States interviewed every fifth person on the list of those persons who had been registered because of Symm's personal knowledge. A large percentage of these registrants did not themselves know Mr. Symm or know how Mr. Symm could have knowledge of their residence.

Thereafter Symm and his deputies analyzed the list of those voters who denied that they knew Mr. Symm, and identified each of those persons whom Symm or his deputies knew. This list appears in this record as Defendant's Exh. 10. Mr. Symm and his deputies were not able to state, with reference to a large number of the persons listed in Defendant's Exh. 10, that they had personal knowledge concerning the residence of such individuals.

The United States of America contends that this procedure and the results thereof prove conclusively that Symm's perception as to the non-discriminatory use of his questionnaire is inaccurate.

Detailed examination of the identity of persons to whom questionnaires are sent also reveals that it appears

that only Prairie View students or persons with addresses on the campus have been issued the Symm questionnaire and that others not known to Symm are not required to complete the questionnaire. This fact, among others, distinguishes the factual patterns assumed by both trial and appellate courts in *Ballas, supra.*

Evidence Relating to County Commissioners and Analysis of Same

There is no evidence that Waller County Commissioners have in any degree participated in Symm's determinations concerning residency of voters, or the selection of his procedures.

The parties have, however, placed before the court detailed correspondence from the County Commissioners to the Department of Justice concerning the Attorney General's objection under Section 5 of the Voting Rights Act of 1976 to a proposed redistricting. In a letter dated August 24, 1976, counsel for the County Commissioners made the following statement:

> "Pursuant to the provisions of 28 C.F.R. § 51.23 (1975), the Commissioners Court of Waller County presents this request for reconsideration of the Attorney General's objection to the 1975 redistricting of Waller County. That objection appears to have been premised upon the failure of the Commissioners Court to include approximately 2,000 of the students at Prairie View A & M University ('Prairie View') in the population base for the reapportionment of Waller County. These excluded students have not qualified to vote in Waller County and are probably ineligible to qualify."

This record does not reveal where the figure of "2,000 students" originated. The testimony of C. A. Thomas, the Registrar of Prairie View, is that as of October 21, 1976, there were 2,918 dormitory students residing at Prairie View. The testimony of Mr. Hicks is that approximately 1,000 Prairie View students attempted to register and vote during the voter registration drive in 1976. The origin of the "2,000 students" figure is obscure.

In view of the undisputed fact that for many years Mr. Symm has applied the presumption set forth in Article 5.08(k), it is impossible to determine from this record, or from the facts as they must exist at the present time, how many duly qualified registered voters do exist at Prairie View University. All that can be said with certainty is that there are probably more than 38 and less than 2,918. Until Mr. Symm and the Commissioners have gained some experience in registering students applying proper procedures, it is impossible to determine how many of the dormitory students at Prairie View are properly registered voters in Waller County.

The case of *Eristus Sams v. Commissioners of Waller County*, Civil Action No. 75-H-965, is a pending case challenging the districting methods used in Waller County. Questions relating to the districting or redistricting of Waller County must be resolved in that case.

AUTHORITIES

Authorities Relating to 26th Amendment Allegations

[1] On June 22, 1970, Congress passed the Voting Rights Act Amendments of 1970, containing in Title III, the following provisions:

TITLE III—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE AND LOCAL ELECTIONS

Declaration and Findings

Sec. 301 (a) The Congress finds and declares that the imposition and application of the requirement that a citizen be twenty-one years of age as a precondition to voting in any primary or in any election—

(1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;

(2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the Fourteenth Amendment of the Constitution; and

(3) does not bear a reasonable relationship to any compelling State interest.

(b) In order to secure the constitutional rights set forth in subsection (a), the Congress declares that it is necessary to prohibit the denial of the right to vote to citizens of the United States eighteen years of age or over.

Prohibition

Sec. 302 Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on

account of age if such citizen is eighteen years of age or older.

Enforcement

Sec. 303 (a)(1) In the exercise of the powers of Congress under the necessary and proper clause of section 8, article 1 of the Constitution, and section 5 of the Fourteenth Amendment of the Constitution, the Attorney General is authorized and directed to institute in the names of the United States such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the purpose of this title.

(2) The district courts of the United States shall have jurisdiction instituted pursuant to this title, and shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28, of the United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by this title shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Definition

Sec. 304 As used in this title, the term "State" includes the District of Columbia.

The statute quoted above was limited to federal elections by *Oregon v. Mitchell,* 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1970), but almost immediately Con-

gress proposed and three-fourths of the states adopted the 26th Amendment which provides that the right of citizens who are over 18 to vote shall not be "denied or abridged" by any state "on account of age."

Senate Report No. 26, 92nd Cong., 1st Sess. (1971), with reference to the 26th Amendment noted that:

> ". . . forcing young voters to undertake special burdens—obtaining absentee ballots, or traveling to one centralized location in each city, for example—in order to exercise their right to vote might well serve to dissuade them from participating in the election. This result and the election procedures that create it, are at least inconsistent with the purpose of the Voting Rights Act, which sought to encourage greater political participation on the part of the young; such segregation might even amount to a denial of their 14th Amendment right to equal protection of the laws in the exercise of the franchise."

In 1976, Congress amended the language of Title III of the Voting Rights Act in § 1973bb to specifically set out that this portion of the Act was "to implement" the 26th Amendment.

Litigation was necessary to enforce the promises of Title III of the Voting Rights Act Amendment of 1970, and the 26th Amendment. One such case was *Whatley. Whatley* does not stand alone, but is merely one of a number of cases reaching virtually the identical conclusion and applying the same philosophy.

The first of this series of cases is *Bright v. Baesler,* 336 F.Supp. 527 (E.D.Ky.1971). Like *Whatley, Bright v. Baesler* was a case in which officials in Lexington, Kentucky sought to enforce a presumption that students

were domiciliaries of their parents' homes. Plaintiffs contended that the official practices were violative of the 14th and 26th Amendments, as well as of 42 U.S.C. § 1971, et seq. As in the case at bar, the registrar in *Bright* had required students to complete and answer a series of questions designed to overcome a presumption that they were domiciliaries of their parents' homes.

The court enjoined the defendants from imposing additional or special criteria for proof of domicile upon University students; required the defendant to ask each applicant the same questions regardless of occupation and required that the questions asked reasonably relate to proof of domicile. The court at 336 F.Supp. at 533 said:

> ". . . Because voting rights involve the First Amendment freedom of association, the State may not impose restrictions upon that right unless there is a compelling state interest in the imposed restriction or classification. *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). It would seem, therefore, that the extra burden of proof imposed upon students in regard to proof of their domicil may only be held constitutional if a compelling state interest is thereby served.
>
> "There is no dispute in this case that Kentucky has the right to require every applicant for voter registration to be a domiciliary of the precinct in which he offers to vote. But may the State require, and is there any compelling reason why it should require, students to go to greater lengths to prove domicil than other citizens. This court thinks not.
>
> * * *
>
> "There is no reason to assume, and the defendants have offered none that would satisfy the compelling

> interest test, that a person claiming to have fulfilled the domiciliary requirement is not to be believed if he is a student . . . Simply put there are no salient reasons to treat registering students differently from other people merely because they are students.
>
> * * *
>
> "Notwithstanding the fact that there may be a significant number of students who do intend to return to their former homes, there is an equally significant number of students who do not intend to return to their former homes, and the presumption against university domicil unfairly discriminates against them.
>
> * * *
>
> "The court cannot conceive of any reason why it should not be presumed that student applicants for voter registration, like any other applicant, have made their application to register in good faith. Admittedly a student may not be able to state with certitude that he intends to permanently live in the university community, but such a declaration is not necessary to establish domicil.
>
> * * *
>
> "This is not to say that the defendants may not require each applicant to prove domicil. The defendants may ask each applicant a series of questions directed at proving domicil, but each applicant should be asked the same questions, and the questions should reasonably relate to proof of domicil."

In *Shivelhood v. Davis*, 336 F.Supp. 1111 (D.Vt. 1971) the registrar was held to be applying an incorrect standard by requiring students to produce more persuasive evidence of their domicile than did other voter applicants. The registrar required of each registrant an

intent to remain in Middlebury permanently, thus precluding most students, who were unable to state with certainty where they would live upon completing their studies. The court said (336 F.Supp. at 1115):

> "The fact that a student lives in a dormitory, is unmarried, is supported financially by his parents who live elsewhere, would be considered a minor in the state in which his parents live and occasionally visits his parents, even if all these factors occur together, is not alone sufficient to preclude domicile in the town in which the student attends school, although these factors may be considered together with other relevant evidence. Furthermore, although we do not imply that the Board has considered them to be relevant, we think it important to note that such factors as the lack of a Vermont driver's license or car registration are irrelevant unless the individual has a license or registration in another state.
>
> . . .
>
> "Thus, the Board of Civil Authority must not require students to fill out a supplemental questionnaire involving questions concerning their domicile unless all applicants are required to complete the same questionnaire. Moreover, the Board of Civil Authority must use its best efforts to insure that any questionnaire is equally relevant to all applicants and not designed only to apply to student applicants."

Ownby v. Dies, 337 F.Supp. 38 (E.D.Tex. 1971) involved Article 5.08(m) of the Texas Election Code, which provided for voting residency of persons under 21 years of age on a different basis than that applied to persons 21 years of age or over. *Ownby, supra*, is in effect an agreed judgment in which the State of Texas agreed with the

plaintiffs that Article 5.08(m) violated the plaintiff's rights under the 14th and 26th Amendments.

The litigation to make genuine the guarantees of the 26th Amendment was not limited to the federal courts. The Supreme Court of California decided *Jolicoeur v. Mihaly*, 5 Cal.3d 565, 96 Cal.Rptr. 697, 488 P.2d 1 (Aug. 27, 1971) decreeing that newly enfranchised young people in California, residing apart from their parents, should be treated like other voters for the purpose of acquiring voting residence and should not be presumed to reside with their parents. Voting registrars of five major counties in California declined to register students on the basis of a California Attorney General's opinion concluding that for voting purposes the residence of an unmarried minor would normally be his parents' home. The plaintiffs sought from the court a decree directing the various registrars to register them in accordance with the same procedures and qualifications followed with respect to adult registrants. The Supreme Court of California granted relief, reasoning that to compel students to travel to the homes of their parents, or to compel them to vote absentee burdened their right to vote, and thus abridged that right in contravention of the 26th Amendment.

The California Supreme Court enjoined the defendants from treating students in a manner different from other voter registrants primarily on the basis of a detailed and comprehensive review of the legislative history of Title III of the Voting Rights Act of 1970 and the 26th Amendment. The California Supreme Court said (96 Cal. Rptr. at 703, 488 P.2d at 7):

> "America's youth entreated, pleaded for, demanded a voice in the governance of this nation. On

campuses by the hundreds, at Lincoln's Monument by the hundreds of thousands, they voiced their frustration at their electoral impotence and their love of a country which they believed to be abandoning its ideals. Many more worked quietly and effectively within a system that gave them scant recognition. And in the land of Vietnam they lie as proof that death accords youth no protected status. Their struggle for recognition divided a nation against itself. Congress and more than three-fourths of the states have now determined in their wisdom that youth 'shall have a new birth of freedom'—the franchise. Rights won at the cost of so much individual and societal suffering may not and shall not be curtailed on the basis of hoary fictions that these men and women are children tied to residential apron strings. Respondents' refusal to treat petitioners as adults for voting purposes violated the letter and spirit of the Twenty-Sixth Amendment."

The identical result was reached by the Supreme Court of New Jersey in *Worden v. Mercer County Board of Elections,* 61 N.J. 325, 294 A.2d 233 (1972). That court distinguished any earlier, inconsistent decisions by pointing out that earlier decisions were made "in relatively immobile areas when it was generally assumed that the college student would lead a semi-cloistered life with little or no interest in non-college community affairs and with the intent of returning on graduation to his parents' home and way of living. Such assumption, of course, has no current validity."

Well reasoned opinions by courts in Pennsylvania, Mississippi and Michigan have reached identical conclusions. See *Sloane v. Smith,* 351 F.Supp. 1299 (M.D. Pa.1972); *Latham v. Chandler,* 406 F.Supp. 754 (N.D.

Miss.1976); *Frazier v. Callicutt,* 383 F.Supp. 15 (N.D. Miss. 1974); *Wilkins v. Bentley,* 385 Mich. 670, 189 N.W.2d 423 (1971).

Ballas must be construed in the light of the foregoing authorities and also in the light of the very careful, limiting language of Judge Roney in *Ballas. Ballas* merely holds that on the record in that case, in which there was no proof of either racial discrimination or discrimination based on age, the use of the Symm form was constitutionally permissible so long as it did not abridge 26th Amendment rights to provide, by itself, the basis for a refusal of registration. Judge Roney carefully pointed out in *Ballas* that:

> ". . . The alleged harm is not in the denial of voter registration but in being required to answer the questionnaire . . .
>
> the cumulative effect of the answers is to support or fail to support the applicant's assertion of residency. It appears to be nothing more . . . There is no proof that the questionnaire was used as a device to prevent legal residents from voting."

In the case at bar, plaintiff does not challenge the Symm questionnaire *per se,* but alleges that in fact Mr. Symm has improperly denied voter registration to numerous students at Prairie View and that the Symm questionnaire was an integral step in the procedure involved in such denial. In addition, there is here both allegation and proof that the questionnaire was used as a part of a pattern of conduct in which Symm denied Prairie View students the right to vote or abridged such right by the application of a presumption declared unconstitutional in *Whatley* and in the other cases discussed above.

Texas Authorities

The evidence in this case establishes that Symm is the only registrar in the State of Texas who uses the questionnaire of the type here in controversy. Seventy counties in the state have institutions of higher learning, and Symm is the only county registrar who employs a questionnaire of the type here under attack. Symm contends this fact is not only immaterial, but that it establishes that he is the only registrar in the state who complies with the requirements of law and who conscientiously makes a factual determination as to the residence of students.

Symm's position is inconsistent both with the 26th Amendment cases discussed above, and also with the relevant Texas cases.

The only Supreme Court of Texas case relating to residency of students is *Mills v. Bartlett*, 377 S.W.2d 636 (Tex.Sup.Ct.1964). While the facts of *Mills, supra*, are not similar to any of the facts relating to any Prairie View student, the language of the Supreme Court is significant (377 S.W.2d at 637):

> ". . . Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue . . ."

It is apparent from *Mills v. Bartlett* that there is no requirement that a student, in order to establish that he is a resident of the place where he wishes to vote, establish that he intends to remain there permanently or for any particular period of time.

A review of the applicable opinions of the Texas courts of civil appeals reveals that the courts have not applied the same standards and the same reasoning as has Mr. Symm in dealing with students and other persons whose life style is similar to that of students. For example, in *Cavallin v. Ivey*, 359 S.W.2d 910 (Tex. Civ. App.—El Paso 1962), the court dealt with a problem created by two Mexican-American citizens of the United States whose wives and families lived in Mexico. The Mexican-American citizens visited their families in Mexico on Sundays, and worked during the week in Brewster County. Although Article 5.08(f) of the Texas Election Code provides that a married man, not permanently separated from his wife, shall be deemed to have a residence where his family lives, the Court of Civil Appeals held that a literal application of that language would disenfranchise these Mexican-American citizens and thus held them qualified to vote in Brewster County even though their families resided in Mexico, and even though the men visited Mexico each weekend and simply worked in Brewster County.

In *McBeth v. Streib*, 96 S.W.2d 992 (Tex. Civ. App. —San Antonio 1936) the voters in question were members of the Civilian Conservation Corps, living in a CCC camp. In finding the young men living in the CCC camp were qualified voters in the county in which they were physically present, the San Antonio Court of Civil Appeals, long before *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675, said (96 S.W.2d at 995):

> "The presumption, of course, obtains here, as generally in this state, that every man has the right and privilege of fixing his residence according to

his own desires. This applies to single men as well as married men, though it is a matter of common knowledge that single men do change their place of residence more frequently than married men. That fact, however, does not change or take away their definite legal rights, if, as, and when they comply with the law and acquire same under a change of residence or otherwise. It is equally true that a man is presumed, ordinarily, to 'reside' where he 'lives,' and this is true for voting privileges, provided he has lived there for the length of time prescribed by law; and certainly this is true if he declared such to be his intention and he proceeds to perform the acts and duties incident to legal residence, such as securing his poll tax receipt or exemption certificate, and for the very purpose of so doing, and then actually votes, at the local or precinct elections of his residence. *McCharen v. Mead,* Tex. Civ. App., 275 S.W. 117; *Hogg v. Waddell,* Tex. Civ. App., 42 S.W.2d 488."

In *Clark v. Stubbs,* 131 S.W.2d 663 (Tex. Civ. App. —Austin 1939) one of the challenged votes was that of a college student who had voted in the county of her parents' residence. In upholding this vote, the court said: ". . . that a student in college *may* retain his or her residence in the county where they resided before they became a student." The obvious inference is that if a student *may* retain his or her residence in the county where he resided before he became a student, he may also lose it and become a resident of the place where he is attending college. This precise situation, where a person loses his previous residence in the county of his parents' residence, is illustrated by *Spraggins v. Smith,* 214 S.W.2d 815 (Tex. Civ. App.—Amarillo 1948) where a young woman had lived with her parents before going to Washington to take a

job which arguably would not be permanent. The court upheld a trial court determination that the young woman, who had gone to Washington for an arguably temporary job, had lost her residence in the county where her parents resided and her vote was disallowed.

Another case where a student lost his residence in the county where his parents resided, and where he had resided before becoming a student, is *Harwell v. Morris,* 143 S.W.2d 809 (Tex. Civ. App.—Amarillo 1940). This was an election contest involving Oldham County. The challenged voter had left Oldham County and gone to Amarillo where he became a student with a part time job. The trial court, with appellate court concurrence, held that the student had lost his residence in the county where he had resided before becoming a student and had become a resident of Amarillo where he was a student with a part time job.

It is clearly inferable from Mr. Symm's detailed testimony on deposition and at the trial that he will register a dormitory student at Prairie View, only if the dormitory student is a Waller County native whose family lives in Waller County, or if the student has been promised a job in Waller County after he completes school. No Texas case supporting this procedure has been discovered. Even without reference to the unconstitutionality of Texas Election Code Article 5.08(k), Symm's procedures and criteria with reference to dormitory students appears inconsistent with the relevant Texas cases.

Authorities Relating to Pendent or Ancillary Jurisdiction

Both the State of Texas and Symm contend that this court has pendent jurisdiction to decide the controversy

between them relating to whether or not the Secretary of State, pursuant to the powers granted to him by the Texas Election Code, has the power to prohibit Symm from using the Symm questionnaire. The United States, for reasons not apparent to the undersigned, contests this pendent jurisdiction.

Rule 13(g), Fed. R. Civ. Proc., in its pertinent parts, states that:

> "A pleading may state as a cross claim any claim by one party against a co-party arising out of the same transaction or occurrence that is the subject matter either of the original action, or of a counter-claim therein . . ."

The term "transaction" as used in Rule 13(g) has a "flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon the logical relationship . . ." *Moore v. New York Cotton Exchange,* 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926).

[2] Applying the language of *Moore* and the test as set forth in *Revere Copper & Brass, Inc. v. Aetna Casualty Insurance Company,* 426 F.2d 709 (5th Cir. 1970), it would appear that the subject matter of the cross-claims between White, Hill and Symm do in fact arise out of the same "transaction" as does the United States' complaint. Accordingly it would appear that this court does have pendent jurisdiction over the controversy between White, Hill and Symm. See *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218. It is apparent that the state and federal claims both derive from a "common nucleus of operative

fact and that all of the claims asserted by all of the parties are such that the parties would ordinarily be expected to try them in one judicial proceeding. See 383 U.S. 715 at 725, 86 S.Ct. 1130, 16 L.Ed.2d 218.

Authority of the Secretary of State to Prohibit Use of the Symm Form

[3] The Texas Election Code, on its bare language, supports the claim of the Secretary of State and the Attorney General that the Secretary of State has power to prohibit use of the Symm form, particularly where, as here, there is substantial evidence that the Symm form has been used as an integral part of a pattern of conduct which abridged the voting rights of a segment of the citizenry. When the statutory language is considered in the light of the history set forth on page 1246 above in this Memorandum Opinion, the conclusion that the Secretary of State did have the authority to issue his Emergency Order No. 004.30.05.313 is confirmed.

The Texas Election Code, after amendment in 1975 in apparent response to the trial court's opinion in *Ballas* reads:

> "Article 1.03. Secretary of State as Chief Election Officer.
>
> "Subdivision 1. The Secretary of State shall be the Chief Election Officer of this state, and it shall be his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws. In carrying out this responsibility, he shall cause to be prepared and distributed to each county judge, county tax assessor-collector, . . . detailed and comprehensive written directives and instructions relating to and based

upon the election laws as they apply to elections . . . Such directives and instructions shall include sample forms of ballots, papers, documents, records and other materials and supplies required by such election laws.

"Article 5.02. Qualification and Requirements for Voting.

* * *

(b) All citizens of this state who are otherwise qualified by law to vote at any election of this state or any district, county, municipality, or other political subdivision, shall be entitled and allowed to vote at all such elections. The Secretary of State shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General."

Bullock v. Calvert, 480 S.W.2d 367 (Sup. Ct. Tex. 1972) is not factually analogous; however, the language of the Texas Supreme Court supports the Secretary of State's power to issue the Emergency Order. Justice Reavley there said:

> " . . . He (i.e., the Secretary of State) is designated 'Chief Election Officer' for the purpose of obtaining uniformity in the operation of the election laws. He is to assist and advise all election officers of the state. It is surely his office to communicate and explain the law to the end that all of the provisions of this Election Code will be followed throughout the state at every election and in every polling place. But no commission is given for him to conduct and pay for party primaries."

Recent cases of the Supreme Court of the United States Relating to State Restrictions on the Right to Vote

Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965) involved a constitutional provision prohibiting any member of the armed forces who moved his home to Texas during the course of his military service from voting in an election in Texas so long as he was a member of the armed services. The State of Texas in *Carrington* made arguments very similar to those asserted by Mr. Symm herein. The state argued it could reasonably be assumed that servicemen were mere transients who would not remain within the state for an extended period.

In rejecting the state's arguments, the Supreme Court said:

> " . . . 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. 'The exercise of rights so vital to the maintenance of democratic institutions,' *Schneider v. State*, 308 U.S. 147, 161, 60 S.Ct. 146, 84 L.Ed. 155 cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents. Yet, that is what Texas claims to have done here . . ."

The Supreme Court in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) held it unconstitutional for the State of New York to restrict the right to vote in school elections to owners of real property or parents of children attending schools, relying upon earlier language of *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed. 2d 506 (1964) wherein it was stated that:

"Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

While pointing out that the plaintiff, a bachelor and non-property owner who lived with his parents, nevertheless was a member of the community and that the entire community had a crucial interest in the quality and structure of public education, Justice Warren said (395 U.S. at 627, 89 S.Ct. at 1890):

" . . . when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable. See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169 (1966). The presumption of constitutionality and the approval given 'rational' classification in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."

On the same day that it decided *Kramer, supra*, the Supreme Court held in *Cipriano v. City of Houma*, 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 (1969) that the City of Houma could not constitutionally restrict the right of all properly qualified voters to vote in elections

called to approve the issuance of revenue bonds by a municipal bonds by a municipal utility.

In *Evans v. Cornman*, 398 U.S. 419, 90 S.Ct. 1752, 26 L.Ed.2d 370 (1970), the Supreme Court held that the State of Maryland could not constitutionally deprive residents of a federal reservation or enclave from voting in the State of Maryland because such deprivation constituted a violation of the Equal Protection Clause. Justice Marshall said (398 U.S. at 423, 90 S.Ct. at 1755):

" . . . there can be no doubt at this date that 'once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.' *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 1081, 16 L.Ed.2d 169 (1966); see *Williams v. Rhodes*, 393 U.S. 23, 29, 89 S.Ct. 5, 9, 21 L.Ed.2d 24 (1968). Moreover, the right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges. See *Yick Wo v. Hopkins*, 118 U.S. 356, 370, 6 S.Ct. 1064, 1071, 30 L.Ed. 220 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S.Ct. 526, 534, 11 L.Ed.2d 481 (1964). And before that right can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny."

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) the Supreme Court held unconstitutional Tennessee's one-year durational residency requirement because such requirements penalize persons who travel from one place to another to establish a new residence during the qualifying period, and thus deny a

portion of the citizenry their rights under the Equal Protecetion Clause of the 14th Amendment.

Mr. Symm's practices here are inconsistent with the philosophy and trend of the foregoing cases, and directly in contravention of the holdings and language in *Carrington v. Rash, supra,* and *Evans v. Cornman, supra.*

CONCLUSION

Mr. Symm's forthright admission that he has, for many years, applied the unconstitutional presumption of *Whatley* establishes that the plaintiff is entitled to relief against Symm. Since Symm has, for a number of years (in the face of advice from the Secretary of State) continued to apply to the students of Prairie View an erroneous rule of law in making his factual determinations of residency, the court believes that a detailed injunction is appropriate and counsel are directed to prepare, and if possible agree upon, the form of an appropriate judgment.

Plaintiff has not on this record demonstrated that it is entitled to any relief against the County Commissioners of Waller County. While it could be inferred that the Court Commissioners of Waller County have taken official action on the incorrect assumption that virtually none of the students at Prairie View are properly classified as residents of Waller County, this fact is not established with definiteness and precision. In addition, this is not a redistricting case. Plaintiff has not sought redistricting. The question of the proper districting of Waller County is the subject matter of another suit, and thus the court at this time will deny relief against the County Commissioners of Waller County, except that the United States is given leave to reopen the factual record within

thirty (30) days, to introduce additional evidence and present additional authorities relating to possible relief against the Waller County Commissioners in this case, if the United States believes that such relief is appropriate.

It appears from this record that the State of Texas, the Secretary of the State of Texas, and the Attorney General of Texas have taken all practicable steps within their command to encourage Mr. Symm to apply a correct rule of law and to protect the 14th, 15th and 26th Amendment rights of Prairie View dormitory students; therefore, no relief against the State of Texas, the Secretary of State of the State of Texas, or the Attorney General of Texas would appear appropriate.

The Clerk will forward true copies hereof to counsel of record who will draft and submit judgment accordingly.

APPENDIX

EXHIBIT A

OFFICE OF ASSESSOR-COLLECTOR OF TAXES

Waller County

Hempstead, Texas

Questionnaire Pertaining To Residence

The undersigned, at the request of the Registrar of Waller County, answers the following questions in support of the application of the undersigned for a voter registration certificate or for appointment as a Deputy Registrary, as the case may be:

Please print or type your name and address:

.....

Are you a college student? . If so, where do you attend school? . How long have you been a student at such school? . Where do you live while in college? . How long have you lived in Texas? . In Waller County? . Do you intend to reside in Waller County indefinitely? . How long have you considered yourself to be a bona fide resident of Waller County? . What do you plan to do when you finish your college education?

.....

Do you have a job or position in Waller County? . Own any home or other property in Waller County? . Have an automobile registered in Waller County? . Have a telephone listing in Waller County? . Belong to a Church, Club or some Waller County Organization other than college related? . If so, please name them:

Where do you live when the college is not in session?

What address is listed as your home address with the college?

Give any other information which might be helpful:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1668

UNITED STATES OF AMERICA,
Appellant,

versus

STATE OF TEXAS, ET AL.,
Appellees.

Appeal from the United States District Court for the Southern District of Texas

(Filed March 31, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges

BY THE COURT:

The application of the doctrine of absention in this case was improper. The motion of the United States for summary reversal is granted to the extent that the final judgment entered in this cause on the 15th day of March, 1977 is vacated and the cause is remanded to that Court for further proceedings consistent with this Order.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 76-H-1681

UNITED STATES OF AMERICA,
Plaintiff,

versus

STATE OF TEXAS; MARK WHITE,
Secretary of State of Texas;
JOHN HILL, Attorney General of Texas;
WALLER COUNTY, TEXAS;
LE ROY SYMM, Tax Assessor-Collector of
Waller County, Texas,
Defendants.

(Filed March 15, 1977)

FINAL JUDGMENT

BE IT REMEMBERED that the above entitled and numbered action came on for a determination on several pre-trial matters, including the Court's consideration *sua sponte* of whether it should abstain from deciding the underlying merits of this action pending a state court determination of state law issues, and for the reasons stated in this Court's Memorandum Opinion of even date, it is

ORDERED that the motion of defendants Symm and Waller County to dismiss, which has been treated as a motion for summary judgment pursuant to *Fed. R. Civ. P.*

12(b), be, and the same hereby is, DENIED, and it is further

ORDERED in accordance with this Court's abstention that the above entitled and numbered action be, and the same hereby is, DISMISSED WITHOUT PREJUDICE to its re-filing after a final determination in state court of the state law issues.

The Clerk shall file this Final Judgment and send a copy to counsel.

Each party shall bear its own costs.

DONE at Houston, Texas, this 15th day of March, 1977.

/s/ JOE INGRAHAM
Joe Ingraham
Senior United States Circuit Judge

/s/ JAMES NOEL
James Noel
Senior United States District Judge

/s/ ROSS N. STERLING
Ross N. Sterling
United States District Judge

UNITED STATES of America, Plaintiff,

v.

STATE OF TEXAS et al., Defendants.

Civ. A. No. 76-H-1681.

UNITED STATES DISTRICT COURT

S. D. Texas,

Houston Division.

March 15, 1977.

The United States brought action against the State of Texas, state officials, and county voting registrar for declaratory and injunctive relief, alleging that discriminatory voting registration procedures were being applied by the county registrar to students attending college in the county. Following denial of motions to dissolve three-judge court, to dismiss, and for preliminary injunction, 422 F.Supp. 917, the three-judge District Court, Noel, Senior District Judge, held that action was not barred by res judicata on basis of final judgments in prior suits brought by private individuals challenging the same voter registration proceedings, since the interests of the United States were not adequately represented in the prior suits because it was seeking to protect voting rights of all college students in county, while prior suits were not class actions, and because United States raised racial discrimination issue not raised in prior suits; but that abstention was appropriate because of presence of uncertain issue of state law as to duty of state officials to prohibit use of questionnaire by county registrar, which

could render moot the federal constitutional issues; and that there is no per se exception to the abstention doctrine in federal voting rights cases.

Dismissed without prejudice.

John P. MacCoon, Dept. of Justice, Washington, D. C., in Charge; James R. Gough, Asst. U. S. Atty., Houston, Tex., Local Counsel, for United States.

David M. Kendall, Jr., First Asst. Atty. Gen., Austin, Tex., for State of Texas and John L. Hill, Atty. Gen.

Mark White, Secretary of State of Texas, Austin, Tex., and Will Sears, Michael T. Powell, Sears & Burns, Houston, Tex., for Waller County, Tex. and Le Roy Symm, Tax Assessor-Collector of Waller County, Tex.

Before INGRAHAM, Senior Circuit Judge, NOEL, Senior District Judge and STERLING, District Judge.

NOEL, Senior District Judge.

MEMORANDUM OPINION

This action is again before the Court, on cross-motions for summary judgment, the United States' Motion for a Preliminary Injunction, and the Court's consideration *sua sponte* of the question of abstention.[1] In this suit for

1. This suit, including a Motion for a Preliminary Injunction, was filed on October 14, 1976. That Motion for a Preliminary Injunction sought temporary relief with respect to the registration of students for the November 2, 1976 general election and was denied as moot by Order entered on October 29, 1976. The Court's memorandum opinion is reported at 422 F.Supp. 917. The Motion for a Preliminary Injunction presently before the Court was filed on February 8, 1977 and seeks temporary relief with respect to local elections to be conducted in Waller County on April 2, 1977.

declaratory and injunctive relief, the United States alleges that discriminatory voter registration procedures and standards are applied by Le Roy Symm, the Tax Assessor-Collector of Waller County, Texas, in his capacity as voting registrar, to students attending Prairie View A & M College in violation of 42 U.S.C. §§ 1971(a) and 1973 as well as the Fourteenth, Fifteenth, and Twenty Sixth Amendments to the Constitution. In particular, the United States alleges that defendant Symm, the voting registrar, selectively uses a self-formulated questionnaire[2] in determining whether students are residents of Waller County for voting purposes, and that Symm is the only registrar in Texas that utilizes such a questionnaire.

I. BACKGROUND

The use of this very same questionnaire by Symm for purposes of determining voter residency has been the

2. The questionnaire asks the following questions:
Please print or type your name and address.
Are you a college student?
If so, where do you attend school?
How long have you been a student at such school?
Where do you live while in college?
How long have you lived in Texas? In Waller County?
Do you intend to reside in Waller County indefinitely?
How long have you considered yourself to be a bona fide resident of Waller County?
What do you plan to do when you finish your college education?
Do you have a job or position in Waller County?
Own any home or other property in Waller County?
Have an automobile registered in Waller County?
Have a telephone listing in Waller County?
Belong to a church, club or some Waller County organization other than college related?
If so, please name them.
Where do you live when the college is not in session?
What address is listed as your home address with the College?
Give any other information which might be helpful?

subject of two prior suits. In *Wilson v. Symm,* 341 F. Supp. 8 (S.D. Tex. 1972), five black students of Prairie View A & M College brought suit under 42 U.S.C. § 1983, alleging that all students in Waller County, and only students, were required to complete the residency questionnaire in violation of the Fourteenth and Twenty Sixth Amendments. The classification alleged in *Wilson* was between students and non-students in Waller County. A claim of racial discrimination was originally plead, but abandoned in later pleadings. The Court in *Wilson* held that the questionnaire did not constitute a discrimination in violation of the Fourteenth or Twenty Sixth Amendments, but that it was a permissible means of determining residency.

In *Ballas v. Symm,* 494 F.2d 1167 (5th Cir. 1974), *aff'g,* 351 F.Supp. 876 (S.D. Tex. 1972), a white student at Prairie View A & M attacked the use of the questionnaire on the theory that Symm was applying a different practice or procedure for determining the residency of students than was applied to non-students in Waller County in violation of the Fourteenth Amendment and 42 U.S.C. § 1971(a)(2)(A).[3] The Fifth Circuit noted that Symm required the questionnaire not only of students, but also of non-student applicants whom he did not know and whose names could not be found on the tax rolls. Thus, the use of the questionnaire was upheld by the

3. 42 U.S.C. § 1971(a)(2)(A) provides that:
(2) No person acting under color of law shall—
(A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote;

Court of Appeals upon the basis of the following determination about the Waller County voter registration procedure:

> The practices or procedures utilized in determining the residency of applicants appear to be uniform. It is a three step procedure: (1) if the registrar knows an applicant to be a resident of the county through his personal knowledge, he does not challenge the registration; (2) if he does not know the applicant, the registrar checks the assertion of residency by inspecting the tax rolls; and (3) if the previous two methods do not reveal any indicia of residency, the applicant is requested to complete the questionnaire to unearth other indicia of residency upon which voter qualification can be based. Residence may be established to the satisfaction of the registrar at any of the three steps. The fact that some applicants may establish their residency at an earlier step than other applicants does not mean that different standards, practices, or procedures are being utilized in contravention of 42 U.S.C.A. § 1971(a)(2)(A).

494 F.2d at 1172.

The United States has now mounted the third attack against the use of Symm's questionnaire. It is undisputed that the questionnaire is used in the same fashion and as a part of the same procedure that was upheld by the Fifth Circuit in *Ballas, supra*. The United States seeks to avoid the holdings of *Ballas* and *Wilson* by alleging that the purpose and effect of the use of the questionnaire is to discriminate against Prairie View A & M students, not only as compared with the practice and procedure by which nonstudents in Waller County are registered, but also as compared with the practices and procedures

by which students are registered in all the other counties wherein institutions of higher learning are located within the State of Texas. It is asserted that no other county in Texas utilizes a residency questionnaire. The alleged intracounty discrimination raises primarily a Twenty Sixth Amendment question of discrimination against students. On the other hand, the alleged discrimination from the statewide perspective raises primarily a question of racial discrimination by virtue of the fact that Prairie View A & M is a predominantly black school, and the United States contends that the registration of those black students could result in Waller County becoming the only county in the State of Texas with a black voting majority.

The gravamen of the present suit is not the use of the questionnaire *per se*, but the lack of statewide uniformity with respect to the use of such a questionnaire. The Texas Secretary of State and Attorney General were joined as defendants in this suit because it is alleged that they have a duty under state law to maintain uniformity in the application of the Texas election laws and that pursuant to that state mandate they should prohibit the practice of using a residency questionnaire by only one county registrar.[4]

Because it appeared that the United States' complaint raised state law issues that might obviate the need for a federal constitutional adjudication, the Court by Minute Entry of February 17, 1977, requested briefing on the applicability of the *Pullman* abstention doctrine. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Before reaching

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4. See plaintiff United States' Brief of October 21, 1976 at p. 3, n. 1.

the question of abstention, however, the Court must first dispose of the motion of defendants Symm and Waller County for summary judgment on their affirmative defense of *res judicata*,[5] which, if meritorious, would bar both the federal and state law claims in this suit.

II. RES JUDICATA

[1, 2] If *res judicata* were applicable here, then the United States would be absolutely barred from relitigating all grounds for recovery that were available to the parties in *Wilson v. Symm*, 341 F.Supp. 8 (S.D. Tex. 1972), and *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974), regardless of whether all grounds for recovery were judicially determined. To apply the principle of *res judicata*, the Court must find that (a) there was a final judgment on the merits on the prior litigation, (b) that the parties here are the same or in privity to the parties in *Wilson* and *Ballas*, and (c) that the cause of action is the same. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 47 S.Ct. 600, 71 L.Ed. 1069 (1927).

[3] Both *Ballas* and *Wilson* resulted in final judgments on the merits, but the second requisite, identity of parties, is not present in this case. Clearly, the named plaintiffs differ, but our inquiry does not end with that determination. The federal courts have repeatedly held that judgments can bind persons not party to the litigation asserted

5. The defendants originally filed a Motion to Dismiss on October 21, 1976. By order of this Court on October 29, 1976, the Motion to Dismiss was deemed a motion for summary judgment pursuant to Rule 12(b), *Fed. R. Civ. P.*, to the extent that it raised the affirmative defense of *res judicata* and was denied in all other respects. That motion is referred to throughout this opinion as the motion for summary judgment.

as a bar if they are in privity to the parties to such litigation. The Fifth Circuit defines privity as a relationship "sufficiently close" to justify preclusion, citing three examples: (a) a non-party who has succeeded to a party's interest in property, (b) a non-party who controlled the original suit and (c) a non-party whose interests were represented adequately by a party in the original suit. *Southwest Airlines Company v. Texas International Airlines Inc.*, 546 F.2d 84, 95 (5th Cir. 1977).[6]

[4] The United States has not succeeded to any interest in property and did not control the original suit in *Wilson* or *Ballas*. The more difficult issue is whether the interests of the United States were represented adequately in *Ballas* and *Wilson*, and after careful consideration, this Court concludes that they were not.

The government's interest here is twofold: first, in terms of the scope of the group of individuals whose rights are

6. The principle of *res judicata* is grounded on the need for judicial finality, for conservation of judicial time and effort, but the principle is circumscribed by the due process requirement that one not be deprived of his day in court. 1B J. Moore, Federal Practice ¶ 0.405, at 622 and ¶ 0.411, at 1252 (2d ed. 1974). To this end the principle binds a non-party to a judgment when the relationship between a party and the non-party is not too attenuated. *Southwest Airlines Company*, 546 F.2d at 95. Historically, the doctrine of privity has been used to identify that relationship which is sufficiently close to justify *res judicata* applicability, but other terms such as virtual representation and substantial identity have been used to describe the relationship, too. "The underlying principle and the result are the same", however, whether the relationship be described as privity or some other term, 1B J. Moore, Federal Practice ¶ 0.411 [1], at 1255 (2d ed. 1974), and the Fifth Circuit recognized in *Southwest Airlines Company*, 546 F.2d at 94-96, that the relationship, not its label, is controlling. Thus, in keeping with this admonition, the Court does not attempt to make nice distinctions as to semantics but rather attempts to focus on the instant relationships and the examples of those skeletal relationships recognized by the Fifth Circuit as being "sufficiently close to justify preclusion" set out above.

being violated, protecting the voting rights of all college students who are required to complete the questionnaire as a condition of registration in Waller County, and, second, in terms of the substantive scope of the alleged violations, preventing the erosion of the Fourteenth, Fifteenth, or Twenty Sixth Amendment, and the legislation enacted thereunder by virtue of voter registration practices which discriminate on the basis of race or age.

In *Wilson* and *Ballas* the only interests represented were the voting rights of the named plaintiffs, neither case having proceeded as a class action. In *Wilson* the plaintiffs themselves voluntarily dropped a class allegation from the original complaint. In *Ballas* the District Court determined that the suit was not properly maintainable as a class action.

Defendants, however, argue that in *Ballas* the Fifth Circuit did find a class from the record before it, defining that class as "those who protest the use of the questionnaire *per se*".[7] This contention lacks merit. On appeal

7. The context of the language the defendants quote as a class certification indicates that the Court was not certifying a class. After upholding the questionnaire as a legitimate step in a three tier procedure to determine the residency of voter applicants and after holding the class action question moot because the rights of persons denied registration after completing the questionnaire have not been infringed, the Court states:

> This decision is limited, however, to the determination that the registrar's use of the questionnaire solely to ascertain residency is valid. We voice no opinion as to the merits of any individual case which might show that Symm's use of the questionnaire is for other purposes. On the record before us, however, there is no allegation or proof that any class of persons is represented or exists other than those who protest the use of the questionnaire *per se*.

Ballas, 494 F.2d at 1172.
Merely emphasizing the limits of its opinion, the Court notes that the only class alleged and of which there is any proof at all consists

the issue of whether or not the suit was properly maintainable as a class action was expressly held to be moot. The Court of Appeals stated,

> Our holding that the questionnaire may be used to assist the registrar in determining the residency of a voter applicant moots the class action question. Since no constitutional or statutory violation flows from the mere use of the questionnaire in determining residency, the rights of persons denied registration after completing the questionnaire have not been infringed.

Ballas, 494 F.2d at 1172. In other words, because the challenge to the use of the questionnaire failed, it made no difference whether the plaintiff represented only himself or a class, thus making a class determination unnecessary.[8] Accordingly, the only interests adequately

of those who protest the use of the questionnaire *per se*. The Court, by saying that there was no proof of any class other than those who protest the use of the questionnaire *per se*, is not thereby making a finding that the plaintiff had met his burden of proof in showing that such a class should be certified.

8. Additionally, the Court's failure to demonstrably apply the class tests enumerated in Rule 23 of the Federal Rules of Civil Procedure indicates that it did not intend that an actual class certification be gleaned from its opinion. Class certification is a discretionary decision for the district court, the standard of appellate review being abuse of discretion. *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969) and *Schumate & Co. Inc. v. National Association of Securities Dealers, Inc.*, 509 F.2d 147 (5th Cir. 1975). In *Johnson* and *Shumate*, however, the District Court made a determination based on the application of the Rule 23 tests, whereas in *Ballas* the District Court's declination to certify the class was motivated by considerations of mootness and *res judicata*. There is some authority for appellate court review of the merits of a district court class decision when Rule 23 has not been applied, 3B J. Moore, Federal Practice ¶ 23.97 at 23-1951 (2d ed. 1976), but when the appellate court determines the merits of a class allegation it applies the Rule 23 tests to the record before it. See, e. g., *Eisen v. Carlisle*

represented by the plaintiffs in *Ballas* and *Wilson* were the voting rights of the individual plaintiffs.

Because the plaintiffs in *Ballas* and *Wilson* were never deemed adequate class representatives and the cases were not certified as class actions, any Waller County student not a party to those cases could now challenge the validity of the questionnaire on the same grounds, and it follows that the United States should similarly not be barred from representing the interests of those students. A persuasively similar case, *Black Voters v. McDonough*, 421 F.Supp. 165 (D. Mass. 1976), involved a class action attack on at-large voting procedures for election of members of the Boston school committee. The defendants argued that the suit was barred by a prior suit in which a final judgment as to the validity of the voting procedures had been rendered. Analyzing the applicability of *res judicata*, the Court in *McDonough* held that no class was ever certified in the first case, that the judgment bound only the parties named in the first suit and those in privity with them, and that the parties in *McDonough* were not the same or in privity to those in the first suit.

[5] Comparing the twofold interest of the United States mentioned above to the interests represented by the *Ballas* and *Wilson* plaintiffs, not only did those prior plaintiffs fail to adequately represent the interest of the United States in terms of protecting the voting rights of Waller County students who were not parties to the

& Jacquelin, 391 F.2d 555 (2nd Cir. 1968), *Green v. Wolf Corporation*, 406 F.2d 291 (2nd Cir. 1968) and *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968). That the Fifth Circuit did not demonstrably apply Rule 23 to the record before it eliminates any doubt as to the language cited by the defendants having any effect other than emphasizing the limits of the opinion.

first two suits, but also in a substantive sense the prior plaintiffs wholly failed to represent the United States' interest in obtaining an adjudication as to possible racial discrimination in violation of the Fourteenth and Fifteenth Amendments and the legislation enacted thereunder. In *Wilson* the plaintiffs, although black, voluntarily dropped their racial discrimination challenge from the original complaint. In *Ballas*, the plaintiff, a white, did not allege racial discrimination and, in fact, stated in his complaint that racial discrimination was irrelevant to his suit.[9] Consequently, this Court concludes that the government's interest in obtaining a judicial determination of whether the questionnaire is racially discriminatory has not been adequately represented in *Ballas* or *Wilson*. For the reasons stated above, the principle of *res judicata* does not apply here, rendering it unnecessary to determine whether or not the causes of action are the same.[10] The defendants' motion for summary judgment will be denied.[11]

9. *Ballas*, 351 F.Supp. at 889.

10. Defendants argue that the United States' failure to participate in the cause of action earlier by initiating suit prior to *Wilson*, by intervening in *Wilson*, by initiating suit on behalf of the alleged class in *Ballas*, by intervening in *Ballas*, or by appearing by special leave in *Ballas* on appeal, "supplies the Defendants' claim of res judicata with particular force" (See Brief in Support of Defendants' Motion to Dismiss, p. 24), but when *res judicata* is simply not applicable, as is the case here, such "particular force" is of no avail.

11. Although *Ballas* and *Wilson* are not *res judicata* of the claims in this suit, the Court intimates no opinion as to the *stare decisis* effect of those decisions. *Res judicata* was reached at this time because, had it been applicable, it would have been a procedural bar to re-litigating the underlying factual merits of the suit. *Stare decisis*, on the other hand, goes to the legal effect to be given the factual determinations made after a trial on the merits and therefore should not be considered prior to a determination of the propriety of abstention.

III. ABSTENTION

Having determined that *res judicata* does not bar the federal or state claims in this suit, the Court must next determine whether it should abstain from adjudicating the federal claims pending a resolution in state court of the state claims. As was pointed out in Part I, *supra*, the major substantive difference between the present case and the *Ballas* and *Wilson* cases is the statewide scope of the discrimination alleged here. Rather than merely complaining of the treatment of students vis-a-vis non-students in Waller County, the present suit complains of the treatment of the predominantly black student population in Waller County vis-a-vis the student population in every other county in Texas wherein institutions of higher learning are located. Rather than complaining of the use of the residency questionnaire *per se*, the failure to obtain statewide uniformity in its use or disuse is complained of. The United States contends that state law imposes a duty upon the Texas Secretary of State and Attorney General to prohibit the nonuniform use of a residency questionnaire. Thus, it is precisely this claim of an impermissible lack of statewide uniformity that not only distinguishes this case from *Ballas* and *Wilson*, but also raises a serious abstention question.

[6] Under the well-known doctrine of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), a federal court should abstain from adjudicating a federal constitutional claim when there are unsettled questions of state law that may be dispositive of the case. The policy considerations underlying the *Pullman* abstention doctrine were set forth by the Supreme Court in *Harman v. Forssenius*, 380 U.S.

528, 534, 85 S.Ct. 1177, 1181-1182, 14 L.Ed.2d 50 (1965) as follows:

> In applying the doctrine of abstention, a federal court is vested with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of underlying issues of state law. Where resolution of the federal constitutional question is dependent upon, or may be materially altered by, the determination of an uncertain issue of state law, abstention may be proper in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication. [citation omitted]

The first requirement of a *Pullman* abstention is the presence of an uncertain issue of state law. The question of state law raised by this suit is whether the use by the Waller County registrar of a questionnaire as a part of his voter registration procedure is a practice which the Texas Secretary of State and Attorney General have a duty under state law to prohibit in order to bring Waller County procedures in line with the procedures used elsewhere in the State of Texas. The Texas Election Code designates the Secretary of State as the chief election officer and makes it his responsibility "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws" through the issuance of directives to appropriate local officials. Tex. Election Code, art. 1.03. Pursuant to this statutory provision, in 1972 the Texas Secretary of State attempted to prohibit the use of residency questionnaires by issuing a bulletin which stated that:

> No county registrar may require any affidavits or questionnaires in addition to the information required on the application for a voter-registration certificate.

In *Ballas v. Symm,* 351 F.Supp. at 888, the District Court considered the effect of the 1972 bulletin and found that the bulletin was merely an advisory opinion, unenforceable at law and without binding effect on the county registrars. In 1975, apparently in response to the *Ballas* ruling, the Texas Legislature added Article 5.02(b)[12] to the Texas Election Code which, *inter alia,* provides for enforcement of the directives of the Secretary of State by way of injunctions obtained by the Attorney General. There have been no state court decisions interpreting Article 5.02(b) or in any way elucidating the extent of the Secretary of State's power and duty to obtain uniformity in the voter registration procedures of county registrars.[13] It would appear, therefore, that the Court is confronted with an unsettled question of state law.

12. Article 5.02(b), Tex. Election Code, provides that:
> All citizens of this state who are otherwise qualified by law to vote at any election of this state or any district, county, municipality, or the political subdivision, shall be entitled and allowed to vote at all such elections. The Secretary of State shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General.

13. Defendants Symm and Waller County argue that this question of state law was settled by the decision of the Texas Supreme Court in *Bullock v. Calvert,* 480 S.W.2d 367 (Tex. 1972). In *Bullock* the Texas Supreme Court considered the question of whether the Secretary of State could pay for the expenses of primary elections out of state funds after the Texas system of financing primaries by filing fees had been declared unconstitutional. The Secretary of State contended that the expenditure of state funds was authorized because he had determined in his capacity as the chief election officer pursuant to Article 1.03 of the Texas Election Code that uniformity could not be obtained in the holding of the approaching primaries without such expenditure. The Texas Supreme Court held that Article 1.03 did not empower the Secretary of State to expend state money because the Texas Constitution required legislative authorization and appropriation for the expenditure of public funds. The holding of *Bullock* is thus limited to an unusual factual situation involving the authority of the Secretary of State to expend state funds and in no way settles or even touches upon the power of the Secretary of State to prohibit variances in the voter registration practices of the various county registrars.

To abstain under *Pullman* the Court must also determine that the resolution of the uncertain issue of state law might clarify or eliminate the federal constitutional issue. If the state courts here should hold that the Texas Secretary of State has the power to regulate county voter registration procedures and that the use of the questionnaire in Waller County is of such significance and is at such a variance with the voter registration procedures used elsewhere in Texas that the Texas Secretary of State and Attorney General have a duty under the Texas Election Code to prohibit its use, then the Fourteenth, Fifteenth, and Twenty Sixth Amendment issues in this suit would be rendered moot. Moreover, even if the state courts should hold that the use of the questionnaire by the Waller County registrar is not subject to the regulation of the Texas Secretary of State and Attorney General, the constitutional claims in this case would be clarified by establishing which state officers are responsible for the alleged constitutional violations.

Another factor supporting abstention in this case is the nature of the state law issue involved. The question of the relative rights and responsibilities of the Secretary of State and the county registrars in interpreting and applying the Texas Election Code is a delicate matter of state administration affecting the balance

of power between state and local officials. Moreover, as was stated by Justice Black in *Oregon v. Mitchell,* 400 U.S. 112, 125, 91 S.Ct. 260, 265, 27 L.Ed.2d 272 (1970):

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

For that reason, the Fifth Circuit in a student voting rights case ordered the district court to abstain, holding that:

> In a matter of such importance to the States and their governments, a federal court should be slow to intervene, but should instead avoid needless conflict with the administration by the State of its own affairs.

Harris v. Samuels, 440 F.2d 748, 752 (5th Cir. 1971).

It should also be noted that those who attack the use of the Waller County questionnaire are not in a position to complain of the piecemeal adjudication and concomitant delay in obtaining an ultimate decision which abstention will generate. The Waller County registrar has utilized the disputed questionnaire in the same form and substantially the same fashion since 1971.[14] There appears to be no reason why the present claims could not have been pursued in either the *Wilson* or *Ballas*

14. See Affidavit of Le Roy Symm, filed on November 19, 1976 at p. 3.

suits, which were filed in 1971 and 1972, respectively. If the United States felt that its interests were not adequately represented by the plaintiffs in *Wilson* or *Ballas,* the United States could have intervened in those suits. Instead, the United States and those who complain of the use of the questinnaire in Waller County have attacked this practice in piecemeal fashion in three different suits over a period of five years. The party in this suit who has cause to complain of piecemeal adjudication and delay is defendant Symm, the registrar of Waller County. However, it appears that Symm will not be prejudiced by the delay attendant to an abstention in this case because he will be free to continue to utilize his questionnaire during the period of the abstention. It is noteworthy that the other defendants, the State of Texas, the Texas Secretary of State, and the Texas Attorney General, all favor abstention in this case.

[7-9] For the foregoing reasons, the Court concludes that the special circumstances necessary to justify a *Pullman* abstention are present in this case. Indeed, the United States does not contend otherwise, but opposes abstention solely on the basis that actions brought under 42 U.S.C. §§ 1971 and 1973 constitute a *per se* exception to the abstention doctrine because those statutes vest the Court with mandatory federal jurisdiction.[15] It is

15. It should be noted in this regard that the Court by Minute Entry of February 17, 1977 indicated its concern about whether the United States had an adequate remedy in state court to obtain an adjudication of the state law issues and requested briefing on that point. The United States apparently concedes that it has an adequate state remedy inasmuch as its brief makes no attempt to show otherwise. The defendants in their briefs agreed that adequate state remedies are available to the United States. It would appear to the Court that the United States could seek declaratory, mandatory injunctive, or mandamus relief in state court. *See Leiter Minerals,*

unclear exactly what meaning the United States attaches to the term "mandatory" federal jurisdiction. It has long been recognized that abstention "does not . . . involve the abdication of federal jurisdiction, but only the postponement of its exercises." *Harrison v. NAACP*, 360 U.S. 167, 177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959).

The United States cites *U.S. v. Wood*, 295 F.2d 772 (5th Cir. 1961), *cert. denied*, 369 U.S. 850, 82 S.Ct. 933, 8 L.Ed.2d 9 (1961),[16] in support of its theory that the Court has mandatory jurisdiction over claims under 42 U.S.C. §§ 1971 and 1973 and that mandatory jurisdiction precludes abstention. In *U. S. v. Wood* the Government sought temporary injunctive relief under 42 U.S.C. § 1971 to restrain defendants from prosecuting a Negro in state court on the theory that the prosecution would intimidate Negroes in that Mississippi county from registering to vote. The district court denied relief on the basis of the Supreme Court's holding in *Douglass v. City of Jeannette*, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943). In *Douglas*, the Supreme Court held that even though the threatened arrests and prosecutions sought to be enjoined in that case might actually deter the exercise of constitutional rights, such deterrence would not be judicially recognized as satisfying the equitable requirement of irreparable injury because comity precluded interference with the state criminal system when

Inc. v. U. S., 352 U.S. 220, 228-29, 77 S.Ct. 287, 1 L.Ed.2d 267 (1957). In the absence of any showing to the contrary, the Court will not presume the state remedies to be inadequate. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501, 61 S.Ct. 643, 85 L.Ed. 971 (1941).

16. The only other case cited by the United States, *U. S. v. Raines*, 362 U.S. 17, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960), is wholly inapposite to the propriety of abstention.

adequate safeguards existed in the state proceedings. In other words, the affirmative defense of adequate state remedies precluded a finding of irreparable federal injury.

The Fifth Circuit in *Wood, supra*, nevertheless, reversed the denial of injunctive relief, pointing out first that jurisdiction under the Civil Rights Act was mandatory and therefore the district court did not have the discretionary latitude traditionally accorded courts of equity when considering requests for injunctive relief. Secondly, the Court of Appeals distinguished *Douglas v. City of Jeannette, supra*, by holding that the defense of adequate state remedies had been eliminated by 42 U.S.C. § 1971(d), which provides that jurisdiction under § 1971 shall be exercised "without regard to whether the party aggrieved shall have exhausted any administrative or other remedies that may be provided by law."

[10, 11] Although *U. S. v. Wood, supra*, makes clear that state remedies need not be exhausted to bring a suit under 42 U.S.C. § 1971, it in no way holds or indicates that where there is an *unsettled* question of state law that might obviate the need for adjudicating federal constitutional claims a federal court might not postpone deciding the federal issues pending a resolution in state court of the state issues. It must be recognized that abstention and exhaustion of state remedies are distinct doctrines serving different purposes. Exhaustion of state remedies is required in certain classes of cases in order to give the state courts as a matter of comity the opportunity to make the initial determination as to all claims, federal or state, raised in those cases.[17] *Pullman*

17. See, e. g., *Darr v. Burford*, 339 U.S. 200, 203-05, 70 S.Ct. 587, 94 L.Ed. 761 (1950), for a discussion of the purpose of the exhaustion doctrine in the context of habeas corpus actions filed by state prisoners.

abstention, on the other hand, is required not simply because a state remedy is available, but because there is an uncertain question of state law which the state courts are better able to resolve and which may make a constitutional adjudication unnecessary.[18]

Although it has been suggested that an exception to the abstention doctrine should be judicially created for civil rights and voting rights cases,[19] the Supreme Court has declined to create any such *per se* exception. In *Harrison v. NAACP*, 360 U.S. 167, 79 S.Ct. 1025, 3 L.Ed.2d 1152 (1959), the Supreme Court was squarely confronted with the question of applicability of the abstention doctrine in a civil rights case and held that abstention was appropriate. *See also, Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). In *Manard v. Miller*, 53 F.R.D. 610 (1971), *aff'd mem.*, 405 U.S. 982, 92 S.Ct. 1253, 31 L.Ed.2d 449 (1972), the Supreme Court affirmed an abstention by a three-judge district court in a student voting rights case.[20] Accord-

18. See *McNeese v. Board of Education for Community Unit School District 187, Cahokia, Ill.*, 373 U.S. 668, 673-74, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963) where the Supreme Court held that exhaustion of state administrative remedies was unnecessary, but distinguished the abstention cases.

19. See, e. g., Wechsler, "Federal Jurisdiction and the Revision of the Judicial Code", 13 L. & Contemp. Prob. 216, 230 (1948).

20. It should also be pointed out that in *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974) the primary claim alleged was a violation of 42 U.S.C. § 1971(a)(2)(A). The Fifth Circuit considered the propriety of abstention based on the existence of the state law issue of whether Ballas was a resident of Waller County. Abstention was found to be inappropriate solely because the state law issue would not eliminate or clarify the federal issue of whether Ballas could be subjected to the questionnaire in making the residency determination. The Fifth Circuit in no way indicated that such cases were automatically excluded from application of the abstention doctrine and its analysis of the abstention issue clearly implies the contrary.

ingly, the Court is of the opinion that there is no exception to the abstention doctrine which would automatically preclude the Court from abstaining in this case.

[12] Having determined that the prerequisites to a *Pullman* abstention are satisfied here, and that the Court should abstain from deciding this suit pending determinatin of the state law issues in state court, the proper procedure normally would be for the Court to enter a stay order and retain jurisdiction of the case. The Texas Supreme Court, however, has ruled that the state courts cannot entertain a suit for a declaratory judgment as to state law issues if a federal court retains jurisdiction over the federal claim. *United Services Life Ins. Co. v. Delaney*, 396 S.W.2d 855 (Tex. 1965). In order to avoid the possibility that some state remedies might otherwise be foreclosed to the United States, this case will be dismissed without prejudice to its re-filing after a final determination by the state courts of the state law issues. *See Harris County Commissioners Court v. Moore*, 420 U.S. 77, 88 n. 14, 95 S.Ct. 870, 43 L.Ed.2d 32 (1975).

Final judgment will be entered of even date denying the motion of defendants Symm and Waller County for summary judgment and dismissing this case without prejudice pursuant to the Court's abstention.[21]

The Clerk shall file this Memorandum Opinion and send a copy to each counsel.

21. In light of the Court's decision to abtain from adjudicating the merits of this case at this time, the Court does not reach the United States' Motions for a Preliminary Injunction and for Summary Judgment. *See Ballas v. Symm, supra*, 494 F.2d at 1169.

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF TEXAS et al., Defendants.

Civ A. No. 76-H-1681.

United States District Court,

S. D. Texas,

Houston Division.

Nov. 3, 1976.

The United States brought an action against the State of Texas for declaratory and injunctive relief, alleging that discriminatory voter registration procedures and standards were applied by a county tax assessor to students attending a college in the county. A Three-Judge Court impaneiled by the district court, Noel, District Judge, held, inter alia, that because of the Government's unconscionable delay in filing suit, any claim for injunctive relief with respect to the 1976 general election was moot.

Motions to dissolve three-judge court, to dismiss, and for preliminary injunction denied.

John P. MacCoon, Atty. in Charge, Dept. of Justice, Washington, D.C., James Gough, Asst. U.S. Atty., Houston, Tex., for plaintiff.

David Kendall, First Asst. Atty. Gen. of Tex., Austin, Tex., for The State of Texas, Mark White and John Hill.

Will Sears, Michael T. Powell, Sears & Burns, Houston, Tex., for Waller County and Le Roy Symm, Tax Assessor-Collector of Waller County, Texas.

Before INGRAHAM, Circuit Judge, and NOEL and STERLING, District Judges.

MEMORANDUM AND ORDER

NOEL, District Judge.

On October 14, 1976, the United States instituted this suit for declaratory and injunctive relief, alleging that discriminatory voter registration procedures and standards were applied by the Tax Assessor-Collector of Waller County, Texas to students attending Prairie View A & M College in violation of the Fourteenth, Fifteenth, and Twenty Sixth Amendments to the Constitution, as well as certain provisions of the Civil Rights Act of 1964 (42 U.S.C. § 1971(a)) and the Voting Rights Act of 1965 (42 U.S.C. § 1973). In particular, the United States complains of the practice of defendant Le Roy E. Symm in the performance of his statutory duties as the Tax Assessor-Collector and Registrar of Waller County, Texas of requiring students who apply to register for voting in Waller County to complete a questionnaire, which inquires as to the applicant's address, ownership of property, auto registration, phone listing, address on the college's records, post-graduate plans, and similar matters. It is alleged that non-students in Waller County are not required to complete such a questionnaire in order to register to vote in Waller County. It is further alleged that students attending colleges and universities in other counties of the State of Texas are not required to com-

plete such a questionnaire in order to register to vote in their college communities.

A conference was conducted in the Chambers of Judge James Noel on Monday, October 18, 1976, to give the United States a prompt hearing on its Application for a Temporary Restraining Order. Although only one of the defendants had been served with summons at that time, all of the defendants appeared at the conference through counsel and consented to the personal jurisdiction of the Court. In considering the Application for a Temporary Restraining Order, the Court was concerned as to why this suit was filed only 19 days before the November 2 election day and in fact one day after absentee balloting had already begun. Counsel for the United States admitted that the Department of Justice with the assistance of the Federal Bureau of Investigation had been investigating the voter registration procedures in Waller County since January of 1976, yet no excuse was offered for the delay in filing suit other than the fact that the Department of Justice had been "negotiating with state officials". In view of this unreasonable delay in filing suit as well as the fact that two prior attacks on this very same questionnaire in Waller County had been unsuccessful, *see Wilson v. Symm*, 341 F.Supp. 8 (S.D. Tex. 1972) and *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972), *aff'd* 494 F.2d 1167 (5th Cir. 1974), Judge Noel denied the Application for a Temporary Restraining Order.

At the in-chambers conference the Court also considered the United States' Motion to Convene a District Court of Three Judges. The request for a three-judge court was predicated on the claim of the United States for injunctive relief to remedy alleged violations of the Twenty

Sixth Amendment. 42 U.S.C. § 1973bb(a)(2) requires that such claims be heard and determined by a three-judge court. Defendants opposed the convening of a three-judge court on the grounds that the Twenty Sixth Amendment claim was not of sufficient substantiality to support three-judge court jurisdiction. *See California Water Service Co. v. City of Redding*, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). Due to the necessity of immediate action if a three-judge court were to be given an opportunity to review the case before the November 2 election date and in keeping with the admonition of the Chief Judge of this Circuit to leave the initial determination of substantiality to the three-judge court itself, *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968), the Motion to Convene a Three-Judge Court was granted and the Chief Judge of the Fifth Circuit was immediately notified by telephone and thereafter in writing in accordance with 28 U.S.C. § 2284(b)(1).

On October 19, 1976 the Chief Judge designated as members of the Three-Judge Court to hear this case the judges whose signatures are hereto affixed. A pre-trial hearing was set for October 21, 1976 to hear oral arguments on the question of whether the Twenty Sixth Amendment claim was of sufficient substantiality to support the jurisdiction of the Three-Judge Court, to consider any pre-trial motions, and to determine whether and when an evidentiary hearing should be set on the United States' Motion for a Preliminary Injunction.

At the hearing on October 21, 1976 the Three-Judge Court joined in the earlier denial by the single Judge of the United States' Application for a Temporary Restraining Order. At the conclusion of oral arguments

and the testimony of two witnesses, the Court announced that it was taking all pending motions under advisement and a ruling would be made on them as soon as possible. Pending, in addition to the United States' Motion for a Preliminary Injunction, are the Motion of defendants Symm and Waller County to Dissolve the Three-Judge Court, and motions by each of the defendants to dismiss. The Court will consider first the Motion to Dissolve the Three-Judge Court, then the motions to dismiss, and finally the Motion for a Preliminary Injunction.

1. Motion to Dissolve the Three-Judge Court

The Motion to Dissolve the Three-Judge Court is based on the contention that the Twenty Sixth Amendment claim asserted by the United States, upon which the convening of the Three-Judge Court was based, is insubstantial. Although on its face the requirement of a three-judge court in the applicable statutes appears to be absolute, the statutes have been interpreted to require three-judge courts if and only if the claims thereunder were not insubstantial. *See, e. g., Ex Parte Poresky*, 290 U.S. 30, 54 S.Ct. 3, 78 L.Ed. 152 (1933); *California Water Service Co. v. Redding*, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). In the context of one of the recently repealed general three-judge court statutes, the Supreme Court has defined insubstantiality as follows:

> Title 28 U.S.C. § 2281 does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial. "Constitutional insubstantiality" for this purpose has been equated with such concepts as *"essentially fictitious," Bailey v. Patterson*, 369 U.S. 31, at 33, 82 S.Ct. 549, 7 L.Ed.2d 512; *"wholly insubstantial," id.; "obviously frivolous," Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 54 L.Ed. 482 (1910); and *"obviously without merit," Ex Parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 78 L.Ed. 152 (1933). The limiting words *"wholly"* and *"obviously"* have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that *claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous;* previous decisions that merely render claims of dobutful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." (Emphasis added)

Goosby v. Osser, 409 U.S. 512, 518, 93 S.Ct. 854, 858, 35 L.Ed.2d 36 (1973).

Defendants argue that *Carrington v. Rash*, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965), *Wilson v. Symm*, 341 F.Supp. 8 (S.D.Tex.1972), and *Ballas v. Symm*, 351 F.Supp. 876 (S.D.Tex.1972), *aff'd*, 494 F.2d 1167 (5th Cir. 1974), render the Twenty Sixth Amendment claim insubstantial. The Supreme Court in *Carrington* invalidated a provision of the Texas Constitution which absolutely prohibited military personnel from establishing voter residency in Texas. In so doing, the Supreme Court observed that only military personnel were subject to an irrebuttable presumption of nonresidency, whereas other groups, such as college students, which also presented "specialized problems in determining residence", were "given at least an opportunity to show the election offi-

cials that they are bona fide residents." 380 U.S. at 95, 85 S.Ct. at 779. In dealing with the special problems presented by the servicemen and students, the Supreme Court emphasized ". . . that Texas is free to take reasonable and adequate steps . . . to see that all applicants for the vote actually fulfill the requirements of bona fide residence." 380 U.S. at 96, 85 S.Ct. at 780.

Defendants argue that the efforts of Symm to determine the true residence of voters through use of a questionnaire falls squarely within the permissible bounds set out in *Carrington*. The problem with this argument is that the Supreme Court in *Carrington* did not consider or decide what steps could be reasonably taken to determine the residency of special groups such as college students. The Supreme Court merely held invalid an irrebuttable presumption against such a group. Moreover, *Carrington* was decided long before the ratification of the Twenty Sixth Amendment. Thus, although the implications of *Carrington* may render the Twenty Sixth Amendment claim in this case of doubtful merit, the Court cannot say that *Carrington* is conclusive or that it renders the Twenty Sixth Amendment claim insubstantial. *Cf. Whatley v. Clark*, 482 F.2d 1230, 1233-34 (5th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1449, 39 L.Ed.2d 492 (1974).

Defendants also rely on *Wilson v. Symm, supra*, and *Ballas v. Symm, supra*, as rendering the three-judge court claim insubstantial. The Waller County voter registration procedure, including the use of the very same questionnaire as is under attack here, was upheld in *Wilson* and *Ballas*. The plaintiffs in *Wilson* and *Ballas* were students at Prairie View A & M College and the defendant was

Symm, one of the defendants in the present case. In *Wilson* the Court expressly rejected the argument that the Waller County procedure violated the Twenty Sixth Amendment. 341 F.Supp. at 17-18.

[1] Although *Wilson* and *Ballas* may very well be dispositive of the Twenty Sixth Amendment claim in this case, the Court is of the opinion that the precedential effect of those decisions do not render the three-judge court claim insubstantial because lower federal court decisions may not be used for that purpose. *See*, Nielsen, "Three-Judge Courts", 66 F.R.D. 495, 501 (1975). The Supreme Court in considering the effect of prior decisions has stated that "[a] claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court . . . .' " (Emphasis added) *Goosby v. Osser*, 409 U.S. 512, 518, 93 S.Ct. 854, 859, 35 L.Ed.2d 36 (1973). Thus, it would appear that insubstantiality must rest upon the decisions of the Supreme Court.

[2, 3] However, defendants argue that *Ballas* and *Wilson* render the Twenty Sixth Amendment claim in this case insubstantial not merely because of their *stare decisis* effect, but also because those judgments operate as a *res judicata* bar against that claim. The difficulty with this argument is that the affirmative defense of *res judicata* does not appear on the face of the pleadings. The assertion of the defense of *res judicata* raises significant issues as to whether the United States, which was not a party to the prior decisions, is nevertheless bound by them and whether this case involves the same cause of action as was adjudicated in the prior decisions. Although defendants may ultimately be entitled to partial summary judgment on the Twenty Sixth Amendment claim, the

Court in determining substantiality may not go beyond the face of the pleadings, *Ex Parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 78 L.Ed. 152 (1933), nor may the Court avail itself of summary judgment procedure. *See Dale v. Hahn*, 440 F.2d 633, 639, n. 11 (2d Cir. 1971). Accordingly, the Court concludes that *Ballas* and *Wilson* do not render the three-judge court claim insubstantial and that the Motion to Dissolve the Three-Judge Court must be denied.

2. Motions to Dismiss

Defendants Le Roy E. Symm and Waller County have filed a Motion to Dismiss, which for the most part consists of allegations that the United States has not acted in good faith in filing this suit so near the pending general election, and that because of the unconscionable delay in filing suit any claim for injunctive relief with respect to the pending election is moot. Since these allegations do not constitute a complete defense to this suit, but merely involve the availability of preliminary injunctive relief, the allegations will be taken up in the part of the opinion dealing with the Motion of the United States for a Preliminary Injunction.

The Motion of defendants Symm and Waller county also attempts to raise the affirmative defense of *res judicata*. The parties are hereby given notice that the Motion to Dismiss, insofar as it attempts to raise the affirmative defense of *res judicata*, shall be treated pursuant to Fed.R.Civ.P. 12(b) as a motion for summary judgment so that matters outside the pleadings may be considered by the Court. *See* 2A Moore's Federal Practice § 12.09 at 2307 n. 26. The parties shall have until November 22,

1976 to present all materials made pertinent to this Motion by Fed.R.Civ.P. 56. Movants Symm and Waller County shall submit a brief on or before November 29, 1976 fully setting forth their position as to why the United States is bound by the judgments in *Wilson* and *Ballas* and which issues or claims are barred by the judgments in those cases. The United States shall file a reply brief on or before December 13, 1976 at which time the Court shall take the motion for summary judgment under advisement.

[4] The State of Texas, the Texas Secretary of State, Mark White, and the Texas Attorney General, John Hill, also have filed a Motion to Dismiss, asserting that the Complaint fails to state a claim for relief against them. The Complaint alleges that:

> [i]n administering and enforcing the voting laws of the State of Texas, the defendants Mark White and John Hill have permitted local election officials, including defendant Leroy Symm, to apply different and more stringent voter registration standards to the students attending Prairie View A & M College than are applied both to students attending the other institutions of higher learning in the State whose total student population is majority white, and to persons throughout Waller County and the State of Texas who are not Prairie View students.

The Texas Secretary of State is the chief election officer in Texas and it is his duty ". . . to obtain and maintain uniformity in the application, operation and interpretation of the election laws" through the issuance of directives to appropriate local officials. Tex. Election Code, art. 1.03. Enforcement of the directives of the Secretary of

State is by way of injunction obtained by the Attorney General. Tex. Election Code, art. 5.02(b). In light of these statutory provisions it is the opinion of the Court that the allegations of the Complaint state a claim for relief against Secretary of State Mark White and Attorney General John Hill.

The Court is also of the opinion that the State of Texas was properly joined as a party defendant. This action was instituted by the United States under, *inter alia,* 42 U.S.C. § 1971(c), alleging that the Tax Assessor-Collector of Waller County, Texas had committed acts constituting a deprivation of a right secured by 42 U.S.C. § 1971(a). 42 U.S.C. § 1971(c) provides in pertinent part that:

> [w]henever, in a proceeding instituted under this subsection any official of a State or subdivision thereof is alleged to have committed any act or practice constituting a deprivation of any right or privilege secured by subsection (a) of this section, the act or practice shall also be deemed that of the State and the State may be joined as a party defendant . . . .

Accordingly, it is clear that the Complaint states a claim for relief against the State of Texas, and the Motion of the State of Texas, Secretary of State Mark White, and Attorney General John Hill to Dismiss must be denied.

3. Motion for a Preliminary Injunction

The United States has filed a Motion for a Preliminary Injunction, seeking to obtain temporary injunctive relief to provide for the registration of Prairie View A & M students prior to the November 2, 1976 election day. An

in-court hearing has been requested to present oral testimony.

[5] Before reaching the question of whether preliminary injunctive relief *should* be granted under traditional equity standards, the Court must first consider whether preliminary injunctive relief *can* be granted at this late date. In other words, is the Motion for a Preliminary Injunction moot? The Court finds, for the reasons which follow, that the undisputed facts of this case establish as a matter of law that the relief sought in the Motion for a Preliminary Injunction cannot now be granted and that the Motion is therefore moot. Accordingly, the Motion for a Preliminary Injunction will be denied without the necessity of an evidentiary hearing. *See Schlosser v. Commonwealth Edison Co.,* 250 F.2d 478 (7th Cir. 1958); *Ross-Whitney Corp. v. Smith Kline & French Laboratories,* 207 F.2d 190, 198 (9th Cir. 1953); 7 Moore's Federal Practice ¶ 65.04[3].

The affidavits attached to the United States' Complaint as well as the admission of counsel in open court establish that the Civil Rights Division of the Department of Justice with the assistance of the Federal Bureau of Investigation began investigating the voter registration procedures in Waller County at least as early as January of 1976. In March of 1976 a registration drive was initiated at Prairie View A & M to register students to vote in time for the May 1 primary elections. The students were assisted in their efforts by Secretary of State Mark White and his staff.[1]

The primary and run-off elections came and went without the filing of any suit contesting Waller County

1. See State of Texas' Exhibit # 1.

voter registration procedures. Finally, on October 14, 1976, nine months after the Department of Justice's investigation had been initiated and seven months after the voter registration drive, the present suit was filed on behalf of the United States by the Civil Rights Division of the Department of Justice.

If defendants had been given 20 days to file an answer or motion as provided for in Rule 12(a), Fed.R.Civ.P., issue would not have been joined in this suit until after election day, since the suit was filed only 19 days before November 2. Furthermore, even a motion for temporary relief, such as a preliminary injunction may be heard only upon adequate notice to the adverse parties. Rule 6(d), Fed.R.Civ.P., which requires that a motion be served not later than 5 days before the hearing of the motion, has been held to be applicable to applications for preliminary injunctions. *See Marshall Durbin Farms, Inc. v. National Farmers Org., Inc.*, 446 F.2d 353 (5th Cir. 1971); *Franz v. Franz*, 15 F.2d 797, 799 (8th Cir. 1926). In addition, 28 U.S.C. § 2284, which sets forth the procedures governing three-judge court cases, requires that at least 5 days notice of the hearing of the suit be given to the governor and attorney general of the state, if the suit is against a state, as is the case here. 28 U.S.C. § 2284(b)(2). Accordingly, taking October 18, the date of the first in-chambers conference, as the date defendants first received notice of the filing of this suit and the pendency of a motion for a preliminary injunction,[2] the Court could not have heard the Motion for

2. Only one of the defendants, Secretary of State Mark White, has been served with summons in this case. The other defendants waived service of summons at the in-chambers conference on October 18, 1976.

a Preliminary Injunction and granted the relief sought by the United States earlier than Octber 26, 1976,[3] which was exactly one week prior to election day.[4]

Although this suit seeks to have a relatively large class of individuals registered for purposes of voting in the November 2 election, it was not even filed until 10 days after the registration of voters for that election was closed. The Texas Election Code cuts off registration for an upcoming election thirty days before the actual date of the election. Tex. Election Code art. 5.13a (subdivision 4). Congress has recognized the need of the states to close registration thirty days before an election by permitting such a procedure in the Voting Rights Act of 1965. 42 U.S.C. § 1973aa-1(d). *See Dunn v. Blumstein*, 405 U.S. 330, 348 n. 19, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Once registration is closed for a particular election, the county clerk must order the print-

3. In computing the five-day time period, Saturday, Sunday, and Monday (Veterans Day), October 23-25, were excluded in accordance with Rule 6(a), Fed. R. Civ. P.

4. Moreover, two of the members of this Three-Judge Court are also members of a three-judge court considering another case, which had been set for trial on October 26, 1976 with the trial estimated to last one week. Both three-judge court cases are entitled to statutory priority on the Court's docket. 28 U.S.C. § 2284(b)(2). However, the case set for trial on October 26 has been pending for six months, unlike the case *sub judice*. In addition, one of the members of this Court had a criminal case set for trial on October 28, 1976. The time limit for the trial of this case under this District's Speedy Trial Plan adopted in conformity with the provisions of the Speedy Trial Act (18 U.S.C. § 3161, *et seq.*) will expire on October 28, 1976. Particularly, in view of the lack of diligence on the part of counsel in filing this suit, the Court is of the opinion that this case is not entitled to priority over the above cases. Thus, even if the Motion for a Preliminary Injunction had necessitated an evidentiary hearing, it is unlikely that the Court could have held the hearing prior to election day.

ing of a sufficient number of ballots for the registered voters of the county. In this case, 7,490 ballots have been printed[5] for the 6,919 registered voters of Waller County,[6] leaving a surplus of only 571 ballots. In addition, the county registrar must prepare for each election precinct in the county an updated, alphabetical list of registered voters. Tex. Election Code art. 5.19a(1). These duties by local election officials must be completed before absentee balloting commences, which is twenty days before election day.

In this case, absentee balloting commenced on October 13, 1976, one day before this suit was filed. Under Texas law, an election is considered to be in progress once absentee balloting commences. *See Skelton v. Yates,* 131 Tex. 509, 119 S.W.2d 91 (1938). Thus, the 1976 general election was already in progress when this suit was filed.

In considering whether the above facts render the Motion for a Preliminary Injunction moot, the Court first turns to decisions of the Texas Supreme Court that have dealt with the issue of mootness in the context of a pending election. In *Sterling v. Ferguson,* 122 Tex. 122, 53 S.W.2d 753 (1932), a suit was brought to enjoin the certification by the Texas Secretary of State of the winner of the Democratic gubernatorial primary because 50,000 illegal votes had allegedly been cast in the primary election. The suit was filed on September 28, only 40 days before the general election of November 8. The state district court dismissed the case on October 5 for lack of jurisdiction. The Texas Supreme Court affirmed, holding that the district court had jurisdiction of the election contest but that the suit had become moot by the date the district court dismissed it. The Court pointed out that the certificate of the Secretary of State containing the names of state candidates must reach the county clerks by October first in order to give those officers time to perform their statutory election duties, such as the posting of the names to be printed on the ballot ten days before the ballots are printed and the printing of the ballots. The Court then applied the rule that a case is moot ". . . when any right which might be determined by the judicial tribunal could not be effectuated in the manner provided by law." 53 S.W.2d at 761. The Court in *Sterling* interpreted this rule to mean that an election contest is moot:

> when the time comes that a final judgment adjudging the validity or invalidity of the election certificate cannot be heard in time for the certificate of the secretary of state to reach the county clerks of the various counties of the state in time for at least substantial performance of the duties prescribed by law for the protection of valuable rights granted nominees and voters.

53 S.W.2d 760. Hence, the Texas Supreme Court ruled that the *Sterling* case was moot. *See also, Polk v. Davidson,* 145 Tex. 200, 196 S.W.2d 632 (1946); *Thomason v. Seale,* 122 Tex. 160, 53 S.W.2d 764 (1932).

The federal courts have likewise shown a great reluctance to grant any relief that might disrupt the orderly conduct of an impending election. In *Williams v. Rhodes,* 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968) the Supreme Court affirmed the holding of a three-judge

5. Waller County's Exhibit # 3.

6. Waller County's Exhibit # 2.

district court that Ohio election laws, which precluded candidates of the American Independent Party and Socialist Labor Party from being placed on the ballots, were unconstitutional. Despite holding in favor of the plaintiffs, the district court had granted relief only to the extent of allowing write-in ballots. The Independent Party immediately sought and obtained from Justice Stewart, as Circuit Justice, an injunction ordering the party's condidates to be placed on the ballot pending appeal. *Williams v. Rhodes*, 89 S.Ct. 1, 21 L.Ed.2d 69 (1968). Several days later a like motion was filed before Justice Stewart by the Socialist Labor Party, which was denied because of the party's failure to move quickly to obtain relief. *Socialist Labor Party v. Rhodes*, 89 S.Ct. 3, 21 L.Ed.2d 72 (1968). The Supreme Court, after deciding the appeal, adopted the action of Justice Stewart. With respect to the Socialist Labor Party's request to be put on the Ohio ballot, the Supreme Court stated that:

> at this late date it would be extremely difficult, if not impossible, for Ohio to provide still another set of ballots. Moreover, the confusion that would attend such a last-minute change poses a risk of interference with the rights of other Ohio citizens, for example, absentee voters.

393 U.S. at 35, 89 S.Ct. at 12. Chief Justice Warren dissented, arguing that because of the delay in instituting suit[7] neither of the parties should have had their candidates placed on the ballot. 393 U.S. at 64, 89 S.Ct. 5. *See also, Cunningham v. English*, 78 S.Ct. 3, 1 L.Ed.2d 13 (1957) (opinion by C. J. Warren as Circuit Justice);

7. The suit was filed in July of 1968. 393 U.S. at 64, 89 S.Ct. 5.

Mississippi Freedom Democratic Party v. Democratic Party, 362 F.2d 60 (5th Cir. 1966); *Garza v. Smith*, 320 F.Supp. 131, 139 (W.D. Tex. 1970), *vacated on other grounds*, 401 U.S. 1006, 91 S.Ct. 1257, 28 L.Ed. 2d 542 (1971).

Although this case does not involve the placing of an additional or different candidate on the ballot, the extreme tardiness of the United States in filing this suit makes it impossible to grant the relief sought without disregarding Texas registration procedures designed to protect the purity of the ballot. The relief sought is that Prairie View A & M students be allowed to apply for registration to vote in the 1976 general election without being required to fill out a questionnaire. Since this suit was not filed until after registration for the 1976 general election had been closed under state law, that provision of state law would have to be disregarded.[8] In addition, the procedure in the Texas Election Code for challenging an applicant's voter qualifications would have to be abandoned because there would be no time to hear such challenges.[9] The procedures and dealines for preparing

8. *See* Tex. Election Code art. 5.19a(1). *See also* Tex. Election Code art. 5.13a(4).

9. *See* Tex. Election Code art. 5.17a, which provides in subdivision (1) that:

> [a]ny person applying for registration may be challenged by the registrar or deputy taking his application or by any registered voter of the county. If after hearing and considering the challenge the officer taking the application is satisfied as to the applicant's entitlement to registration, he shall register the applicant, but if not so satisfied, he shall refuse to register the applicant. . . . When the registrar refuses to register an applicant, the applicant may appeal from the decision of the registrar to a district court of the county within thirty days after the registrar's decision, and the decision of the district court shall be final.

a certified alphabetical list of registered voters for each election precinct in the county by the county registrar would have to be substantially modified.[10] The registrar would have to rush out a last-minute updated list with the attendant opportunity for error. Finally, a substantial number of additional ballots would have to be printed. Considering the fact that the United States seeks to have registered approximately 2,500-3,000 persons in a county that presently has only 6,919 registered voters, not only would Texas registration procedures be frustrated, but it might very well be physically impossible to register so many individuals in the short time remaining before election day and then make adequate preparations for their voting. Accordingly, it is the opinion of the Court that the Motion for a Preliminary Injunction is moot.

Ballas v. Symm, 351 F.Supp. 876 (S.D. Tex. 1972), *aff'd,* 494 F.2d 1167 (5th Cir. 1974), presented virtually the same factual situation as here. The *Ballas* suit was filed 26 days before election day and six days before absentee balloting commenced, but five days after registration had closed. 351 F.Supp. at 881-82. In *Ballas,* which was brought by a private litigant as a class action, preliminary injunctive relief was requested for the class. The request was denied as moot because, as in the case *sub judice,* the requested relief could not be granted to the entire class at such a late date. 351 F.Supp. at 880-882.

In light of the holding in *Ballas,* the United States was fully warned as to the probable consequences of waiting so long to file this suit. The only excuse offered by counsel is that the Department of Justice was negoti-

10. *See* Tex. Election Code art. 5.19a.

ating with state officials in the hope that state and local officials would correct any deprivation of voting rights. Giving state officials the first opportunity to remedy the alleged violations may have been a valid reason for waiting until after the primary elections to take action. But once the primary elections had been conducted and the Department of Justice was still dissatisfied with the situation, suit should immediately have been filed, if the United States expected to obtain any relief before the general election in November. Apart from the issue of mootness, this unreasonable delay in filing suit may be a sufficient ground by itself to deny preliminary injunctive relief under the doctrine of laches. The Court, however, need not decide that question since the Motion for a Preliminary Injunction is clearly moot.

The United States asks the Court to overlook its lack of diligence in filing suit, disregard Texas registration procedures, and in effect set itself up as the registrar of Waller County for purposes of registering students to vote in an election already in progress. The proposed justification for this extraordinary relief is that otherwise a large number of students will be denied their fundamental right to vote in the November 2 election. However, Secretary of State Mark White testified at the pretrial hearing that his study of the Texas voter registration records indicated that approximately half of the resident students at Prairie View A & M were already registered to vote in Texas. The depositions of the 16 key student witnesses for the United States indicates that at least half of them are registered to vote in Texas.[11] These

11. Eight of the students indicated that they were registered to vote in counties in Texas other than Waller County. Two had applied for registration to vote elsewhere, but had not yet heard

percentages compare favorably with the percentage of all citizens of voting age in Texas who are registered to vote, which according to Secretary of State Mark White is about 50%. Thus, what is at stake is not the right to vote *per se*, but the right to vote in a particular county without first abiding by the registration procedures of that county, which have been twice judicially approved.

The United States seeks to have this federal court precipitously and belatedly intervene in the affairs of the State of Texas with respect to a twice-litigated voter registration procedure without adequate notice to defendants, without adequate time for preparation and briefing by counsel, and without adequate time for consideration of the issues by the Court. The Court declines the invitation. This suit was simply filed too late for any immediate relief to be granted and, therefore, the Motion for a Preliminary Injunction will be denied.[12]

For the foregoing reasons, it is ORDERED that the Motion of defendants Symm and Waller County to Dissolve Three-Judge Court be, and the same hereby is, DENIED, and it is further

ORDERED that the Motion of defendants Symm and Waller County to Dismiss, insofar as it raises the defense of *res judicata*, shall be treated as a motion for summary

whether their applications had been accepted. Four indicated that they were not registered to vote anywhere. The remaining two did not indicate whether they were registered to vote.

12. Sinc no issue of fact is involved in this denial of a preliminary injunction, it would appear that findings of fact and conclusions of law are unnecessary. *Douds v. Local 1250,* 170 F.2d 695 (2d Cir. 1948). To the extent that the same are required, however, this Memorandum and Order shall constitute the Court's findings of fact and conclusions of law.

judgment and determined in accordance with the procedures set forth in this Memorandum and Order and that the Motion to Dismiss in all other respects be, and the same hereby is DENIED, and it is further

ORDERED that the Motion of defendants Mark White, John Hill, and the State of Texas be, and the same hereby is, DENIED, and it is further

ORDERED that the Motion of the United States for a Preliminary Injunction be, and the same hereby is, DENIED.[13]

13. By Order entered on October 29, 1976 the Court announced its rulings on the pending motions and stated that a memorandum would follow setting forth the Court's reasons. This Memorandum and Order is entered to accomplish that purpose.

AMENDMENT XXVI.—RIGHT TO VOTE; CITIZENS EIGHTEEN YEARS OF AGE OR OLDER

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.

SUBCHAPTER I-C—REDUCING VOTING AGE TO EIGHTEEN IN FEDERAL, STATE, AND LOCAL ELECTIONS

§ 1973bb. Enforcement of Twenty-Sixth Amendment

(a) (1) The Attorney General is directed to institute, in the name of the United States, such actions against States or political subdivisions, including actions for injunctive relief, as he may determine to be necessary to implement the twenty-sixth article of amendment to the Constitution of the United States.

(2) The district courts of the United States shall have jurisdiction of proceedings instituted under this subchapter, which shall be heard and determined by a court of three judges in accordance with section 2284 of Title 28, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing and determination thereof, and to cause the case to be in every way expedited.

(b) Whoever shall deny or attempt to deny any person of any right secured by the twenty-sixth article of amendment to the Constitution of the United States shall be fined not more than $5,000 or imprisoned not more than five years, or both.

As amended Pub.L. 94-73, Title IV, § 407, Aug. 6, 1975, 89 Stat. 405.

Art. 1.03. Secretary of State as chief election officer

Subdivision 1. The Secretary of State shall be the chief election officer of this state, and it shall be his responsibility to obtain and maintain uniformity in the application, operation and interpretation of the election laws. In carrying out this responsibility, he shall cause to be prepared and distributed to each county judge, county tax assessor-collector, and county clerk, and to each county chairman of a political party which is required to hold primary elections, detailed and comprehensive written directives and instructions relating to and based upon the election laws as they apply to elections, registration of electors and voting procedures which by law are under the direction and control of each such respective officer. Such directives and instructions shall include sample forms of ballots, papers, documents, records and other materials and supplies required by such election laws. He shall assist and advise all election officers of the state with regard to the application, operation and interpretation of the election laws.

Subd. 2. At least 35 days before each general election for state and county officers, the Secretary of State shall prescribe forms of all blanks necessary under this code and shall furnish same to each county clerk. The Secretary of State shall at the same time certify to each county clerk a list of all the candidates who have been nominated for state and district offices and all other candidates whose names have been certified to the Secretary of State to be placed on the general election ballot.

Subd. 3. Upon petition of fifteen or more resident citizens of any one county to the Secretary of State, the

Secretary of State shall, or may at any time upon his own initiative, appoint inspectors to observe all functions, activities, or procedures conducted pursuant to the election laws of this State. Any such inspectors shall be subject to the direction of and responsible to the Secretary of State and he may terminate any appointment at any time. Any such inspectors may be present at, observe, and take reasonable steps to evidence all activities, functions and procedures (except for the marking of any ballot by a voter, unless being assisted by an election officer) at any polling place, place of canvass, central counting station, or other place where official election or registration functions take place. The Secretary of State or any member of his staff may, upon the initiative of the Secretary of State alone, whether any violation of election laws is suspected or not, be present at, observe, and take reasonable steps to evidence any activities, functions, and procedures at any polling place, place of canvass, central counting station, or other place where official election or registration functions take place. Any inspectors appointed under this provision shall report to the Secretary of State any violations of law observed and the Secretary of State may refer the violation to the Attorney General or a prosecuting attorney for appropriate action.

Amended by Acts 1967, 60th Leg., p. 1860, ch. 723, § 3, eff. Aug. 28, 1967; Subd. 3 added by Acts 1975, 64th Leg., p. 2074, ch. 681, § 1, eff. June 20, 1975; Subd. 2 amended by Acts 1977, 65th Leg., p. 882, ch. 332, § 1, eff. Aug. 29, 1977.

Article 5.01 Classes of persons not qualified to vote

The following classes of persons shall not be allowed to vote in this state:

1. Persons under 18 years of age.

2. Idiots and lunatics.

3. All paupers supported by the county.

4. All persons convicted of any felony except those restored to full citizenship and right of suffrage or pardoned.

Amended by Acts 1975, 64th Leg., p. 2082, ch. 682, § 3, eff. Sept. 1, 1975.

Art. 5.02 Qualification and requirements for voting

(a) Every person subject to none of the foregoing disqualifications who is a citizen of the United States and a resident of this state and is eighteen years of age or older, and who has complied with the registration requirements of this code, is a qualified voter. No person may vote in an election held by a county, municipality, or other political subdivision unless he is a resident of the subdivision on the day of the election; and, except, as expressly permitted by some other provision of this code or another statute of this state, no person may vote in an election precinct other than the one in which he resides. The provisions of this section, as modified by Section 35 of this code (Article 5.03, Vernon's Texas Election Code), apply to all elections, including general, special, and primary elections, whether held by the state, by a county, municipality, or other political subdivision of the state, or by a political party.

(b) All citizens of this state who are otherwise qualified by law to vote at any election of this state or any district, county, municipality, or other political subdivision, shall be entitled and allowed to vote at all such elections. The Secretary of State shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General.

Amended by Acts 1966, 59th Leg., 1st C.S., p. 1, ch. 1, § 1; Acts 1967, 60th Leg., p. 936, ch. 414, § 1, eff. Feb. 1, 1968; Acts 1975, 64th Leg., p. 2076, ch. 681, § 4, eff. June 20, 1975; Acts 1975, 64th Leg., p. 2082, ch. 682, § 4, eff. Sept. 1, 1975.

Art. 5.08 Rules for determining residence

(a) As used in this code, the word "residence" means domicile; i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence.

(b) For the purpose of voting, residence shall be determined in accordance with the common law rules as enunciated by the courts of this state and the following statutory rules; but in case of a conflict, the statutory rules shall control.

(c) A person shall not be considered to have lost his residence by leaving his home to go to another place for temporary purposes only.

(d) A person shall not be considered to have gained a residence in any place to which he has come for temporary purposes only, without the intention of making such place his home.

(e) The residence of a single person, or a married person permanently separated from his or her spouse, is considered to be where such person usually sleeps at night, but if it be a temporary establishment, or for a transcient purpose, it shall not be so considered.

(f) For a married man not permanently separated from his wife, the place where his family lives shall be considered his residence, but if it be a temporary establishment for his family, or for transcient purposes, it shall not be so considered.

(g) If a married man has his family living in one place and he does business in another, the former shall be considered his residence, but when a man has taken up his abode at any place with the intention of remaining

there and making it his home, and his family refuses to reside with him, then such place shall be considered his residence.

(h) The residence of a married woman not permanently separated from her husband is considered to be the place where her husband has his residence, but a married woman not living in a household with her husband may establish a separate voting residence from that of her husband.

(i) The residence of one who is an officer or employee of the government of this state or of the United States shall be construed to be where his home was before he became such officer or employee unless he has become a bona fide resident of the place where he is in government service or some other place. For the purpose of this section, teachers and other professional personnel employed in the public free school system of this state shall be considered to be employees of the government of this state.

(j) No person in the military service of the United States shall acquire a residence in this state while he is living on a military post in quarters which he is required to occupy. A person in military service who is permitted to choose his place of abode shall not be considered to have acquired a residence merely in consequence of his presence at the place where he lives while performing his military duties; and such person shall not be considered to have acquired a residence unless he intends to remain there and to make that place his home indefinitely, both during the remainder of his military service whenever military duties do not require his presence elsewhere, and after his military service is terminated.

(k) The residence of a student in a school, college, or university shall be construed to be where his home was before he became such student unless he has become a bona fide resident of the place where he is living while attending school or of some other place. A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.

(l) The residence of an inmate of a public eleemosynary institution shall be construed to be where his home was before he became such inmate unless he has become a bona fide resident of the place where the institution is located or of some other place. No person who is an inmate of a prison or who is an involuntary inmate of any hospital or other eleemosynary institution shall acquire a residence, while he is an inmate, at the place where the institution is located.

(m) Repealed by Acts 1975, 64th Leg., p. 2098, ch. 682, § 28, eff. Sept. 1, 1975.

Amended by Acts 1967, 60th Leg., p. 1879, ch. 723, § 21, eff. Aug. 28, 1967; Subsec. (m) added by Acts 1971, 62nd Leg., p. 2528, ch. 827, § 25, eff. Aug. 30, 1971.

Art. 5.09a Registrar of voters

Subdivision 1. Unless the county commissioners court makes a different designation as authorized in Section 41b or Section 56a of this code, the county tax assessor-coliector of each county in this State is the registrar of voters in that county.

Subdivision 2. The registrar of voters shall be responsible for the registration of voters, the keeping of records, the preparation of lists of registered voters, and such other duties incident to voter registration as are placed upon him by law. Any of the duties of the registrar, except the hearing of appeals on denial of registration and the hearing of challenges of registration, may be performed through a deputy or deputies. The registrar shall not make any charge against a voter for performing any duty incident to voter registration unless expressly authorized by law to do so. The registrar is authorized to administer oaths and certify thereto under the seal of his office in every case where an oath is required in complying with any portion of this code connected with his official duties. The registration records, the applications for registration, and the duplicate registration certificates on file in the registrar's office shall be open for public inspection at all times when the office is open.

Sudivision 3. The expenses of the registrar in excess of the reimbursements received from the state under Section 51b of this code (Article 5.19b, Vernon's Texas Election Code) shall be borne by the county.

Amended by Acts 1977, 65th Leg., p. 1497, ch. 609, § 1, eff. Aug. 29, 1977.

Art. 5.10a Persons entitled to register

A person is entitled to register as a voter in the precinct in which he has his legal residence (i.e., domicile), as defined in Section 40 of this code (Article 5.08, Vernon's Texas Election Code), if:

(1) on the date of applying for registration he is a citizen of the United States and is subject to none of the disqualifications, other than nonage, stated in Section 33 of this code (Article 5.01, Vernon's Texas Election Code); and

(2) within 60 days after applying for registration he will be 18 years of age or older.

However, no person may vote at any election unless he fulfills all the qualifications of an elector for that election.

Amended by Acts 1971, 62nd Leg., p. 2509, ch. 827, § 2, eff. Aug. 30, 1971; Acts 1975, 64th Leg., p. 750, ch. 296, § 1, eff. May 27, 1975.

Art. 5.17a Challenge of registration; appeal

(1) Challenge of applicant. Any person applying for registration may be challenged by the registrar or deputy taking his application or by any registered voter of the county. If after hearing and considering the challenge the officer taking the application is satisfied as to the applicant's entitlement to registration, he shall register the applicant, but if not so satisfied, he shall refuse to register the applicant. If refusal has been by a deputy registrar, the applicant may appeal to the registrar, who shall decide the challenge within seven days. When the registrar refuses to register an applicant, the applicant may appeal from the decision of the registrar to a district court of the county within thirty days after the registrar's decision, and the decision of the district court shall be final.

(2) Challenge of registered voter. Any registered voter shall have the right to challenge the registration of any other registered voter in his county by filing with the registrar of voters a sworn statement setting out the grounds for such challenge. The registrar shall give notive to the person whose registration has been challenged, and a hearing shall be held and a ruling made thereon. Either party to the controversy may appeal from the decision of the registrar to a district court of the county of registration within thirty days after the registrar's decision, and the decision of the district court shall be final. A challenged voter may continue to vote until a final decision is made canceling his registration.

(3) Jurisdiction of district court; trial of appeal. The district courts of this State shall have jurisdiction to hear and determine appeals from decisions of the regis-

trar refusing an application for registration and from decisions of the registrar either canceling or refusing to cancel a registration. The trial in the district court shall be de novo. The court shall give priority to the appeal if an election is pending within sixty days. Acts 1951, 52nd Leg., p. 1097, ch. 492, art. 49a, added Acts 1966, 59th Leg., 1st C.S., p. 1, ch. 1, § 2.

Art. 5.18a Change of residence; cancellation or transfer of registration

Subdivision 1. Change of resident within precinct. A registered voter who changes his place of residence within the election precinct shall give written notice to the registrar of the change of address and obtain a corrected certificate as provided in Subdivision 1 of Section 48a of this code (Article 5.16a, Vernon's Texas Election Code).

Subdivision 2. Change of resident to another precinct within county. A registered voter who changes his residence to another election precinct within the county may vote a full ballot in the precinct of his former residence, if otherwise qualified, during the first 90 days after the removal, but not thereafter, in any election in which there is listed on the ballot any office or proposition on which he is eligible to vote at his new residence.

If he obtains a transfer of his registration to the precinct of his new residence during the 90-day period, he may vote only in the precinct of his new residence after the 29th day following the transfer. He may not vote in the precinct of his new residence before the 30th day following the transfer.

To obtain a transfer of his registration, the voter shall present the registrar with a written, signed request that his registration be transferred to the precinct of his new residence. Upon receiving a request for transfer, the registrar shall make the necessary changes on the registration records in his office and shall issue a new corrected registration certificate to the voter. He shall attach the request to the registrant's original application.

Subdivision 3. Change of residence to another county. (a) A registered voter who moves from one county to another within the State must reregister in the county of his new residence in the same manner as an initial registrant. However, during the first 90 days after removal the voter may vote a limited ballot, as provided in Section 37c of this code (Article 5.05c, Vernon's Texas Election Code), if a reregistration in the county of new residence has not become effective.

(b) Where a registered voter who resides in a municipality or other political subdivision which is situated in more than one county moves from one county to another within the political subdivision, if the election precincts of the political subdivision are so constituted that the voter lives in the same precinct, he may continue to vote on the registration in the county of former residence at elections held by that political subdivision so long as that registration continues in effect. If he resides in a different precinct, during the first 90 days after the removal he may continue to vote in the precinct of his former residence at elections held by the political subdivision, on the registration in the county of former residence, if a reregistration in the county of new residence has not become effective.

Subdivision 4. Notification to registrar in county of former residence. When the registrar receives an application for registration of a voter who is registered in some other county, he shall notify the registrar of that county, giving him the voter's name, former registration certificate number if known, and former residence address. Upon receipt of notice, the registrar of the county wherein the voter was formerly registered shall cancel the regis-

tration in that county. When the registrar receives an application for registration of a voter who was registered in the previous two-year certificate period in any county and has not received a current registration certificate, he shall notify the registrar of that county, if different from the registrar's county, giving him the voter's name, former residence address, birth date, and social security number if available, and may also include a copy of the voter's signature. Upon receipt of such notice, the registrar of the county wherein the voter was formerly registered shall remove the voter from the list of cancelled voter registration certificates of the appropriate election precinct. If the voter's name is on a list of cancelled voter registration certificates in the county wherein he is attempting to register, the registrar of such county shall cause the voter's name to be removed from the appropriate precinct list. The name of any person shall not be removed from the list of cancelled voter registration certificates until such registration is effective.

Subdivision 5. (a) The registrar may utilize any means available to determine whether a registered voter's current legal residence may be other than that indicated as the voter's legal residence on the registration records.

(b) Upon receiving information indicating that a registrant has a residence other than that shown on the registrant's registration records, or that indicates the existence of any grounds of disqualification other than death, the registrar shall send a notice to such person by forwardable mail at the permanent residence address or, if provided, the mailing address on the registrant's registration application and any new address of the registrant, if known, requesting a verification of the regis-

trant's current residence address, or other relevant information which would be determinative of the registrant's right to retain his registered status, and providing information of the necessity for the registrant to amend the registration records subsequent to a change in legal residence or to provide information establishing his right to retain his current registered status. The notice shall state that the registrant's registration will be cancelled if the registrar does not receive an appropriate reply within 60 days from the date on which the notice is mailed. If the registrant replies to the notice, the registrar shall take the appropriate action indicated by the reply. If no reply is timely received, the registrar shall cancel the registration. Notice of such cancellation shall be sent to the registrant at the new address, if it is known; otherwise, it shall be sent to the residence or mailing address on the registration records. If the notice mailed to the permanent residence address on the registrant's application is returned to the registrar with no forwarding address information available, the registrar shall cancel the registration.

(c) In the event the registrar cancels a voter's registration pursuant to Paragraph (b) of this subdivision, such voter may, within 10 days after the date of cancellation by the registrar, request, in writing, a hearing before the registrar. The registrar, upon notice to the voter, shall conduct a hearing within five days of receipt of the request from the voter, or at any later time upon the consent of the voter. The registrar shall then determine whether to cancel the registration. The voter may appeal from a decision to cancel his registration to a district court of the county of registration within 29 days after the registrar's decision, and the decision of the district

court shall be final. A voter who appeals a cancellation of his registration under the provisions of this paragraph may continue to vote until a final decision is made cancelling his registration.

Subdivision 6. The Secretary of State shall prescribe forms for the various documents required by this section. However, the registrar may also accept and use forms other than those prescribed by the Secretary of State.

Amended by Acts 1969, 61st Leg., p. 2662, ch. 878, § 15, eff. Sept. 1, 1969; Acts 1971, 62nd Leg., p. 2516, ch. 827, § 10, eff. Aug. 30, 1971; Acts 1975, 64th Leg., p. 758, ch. 296, § 10, eff. Nov. 5, 1975; Subd. 4 amended by Acts 1977, 65th Leg., p. 1217, ch. 468, § 9, eff. Aug. 29, 1977.

CERTIFICATE NUMBER
(for official use only)

Election Pct. #

VOTER REGISTRATION APPLICATION

Mail or deliver application to your County Tax Assessor Collector 30 days prior to an election.

TYPE OR PRINT IN INK

APPLICATION NUMBER
(for official use only)

LAST NAME

FIRST NAME (do not use husband's first name)

MIDDLE NAME

MAIDEN SURNAME IF MARRIED WOMAN

PERMANENT RESIDENCE ADDRESS

STREET & APT. # OR ROUTE # OR LOCATION (not P.O. Box)

CITY ZIP

MAILING ADDRESS IF DIFFERENT FROM ABOVE:

STREET OR P. O. BOX

CITY

STATE ZIP

SOCIAL SECURITY NO. ☐☐☐ ☐☐ ☐☐☐☐ SEX (M/F) _____

BIRTH DATE MONTH ____ DAY ____ YEAR ____

PHONE # _____

BIRTH PLACE CITY _____ OR COUNTY _____

STATE _____ OR FOREIGN COUNTRY _____

IF NATURALIZED, COURT OR ITS LOCATION

IF NOW REGISTERED IN ANOTHER TEXAS COUNTY

NAME OF COUNTY

LAST RESIDENCE ADDRESS IN COUNTY

CITY ZIP

I certify that the applicant is of legal age, is a citizen of the United States, has met all legal requirements, and holds legal residence in this County. I understand that the giving of false information to procure the registration of a voter is a felony.

SIGNATURE OF VOTER/AGENT

X _____

Agent must be a registered voter and must be only (Check one applicable)

Husband Wife Mother Father Son Daughter

The disclosure of social security number is voluntary only, is solicited by authority of Section 45B, Texas Election Code, and will be used only by election official to maintain the accuracy and integrity of the registration records.

R1

No. 77-1688

In the Supreme Court of the United States

OCTOBER TERM, 1978

LE ROY SYMM, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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Solicitor General

DREW S. DAYS, III
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. C) is reported at 445 F. Supp. 1254.

JURISDICTION

The judgment of the three-judge district court was entered on March 3, 1978 (J.S. App. B). Notice of appeal was filed on March 27, 1978 (J.S. App. A), and the jurisdictional statement was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973bb.

QUESTION PRESENTED

Whether the means used to determine the voting eligibility of students living on a college campus in Waller County, Texas, denied the students the right to vote on an equal basis with other citizens.

STATEMENT

1. This case involves a challenge to one aspect of the voter registration practices employed in Waller County, Texas. Waller County, a small rural county west of Houston, has a population of approximately 15,000, a slight majority of which is black. Prairie View A & M University, a state-supported, predominantly black university, is located in Waller County. The dispute that gave rise to this case concerned the eligibility of students at the university to vote in Waller County on the same terms as non-students.

Appellant, the Tax Assessor-Collector of Waller County, is responsible for registering voters in the county. It is his practice ordinarily to refuse to permit unmarried students living in the dormitories of Prairie View A & M to register to vote, unless they prove to his satisfaction that they are permanent residents of the county (J.S. App. C16).

Appellant puts this practice into effect by using a special questionnaire that he has devised to determine whether students at Prairie View who attempt to register to vote have met his standards of residency in Waller County. The questionnaire, which is sent only to Prairie View students or to persons with addresses on the campus (J.S. App. C19-C20), inquires whether the prospective voter is a student, whether he intends to reside in Waller County indefinitely, what he plans to do after college, whether he has a job in Waller County, and where he lives

when college is not in session (J.S. App. C43). Very few students have succeeded in registering to vote after having been sent appellant's questionnaire. Appellant sent his questionnaire to 545 persons from Prairie View who applied to register in 1976. Only 35 were ultimately registered to vote—25 on the basis of their responses to the questionnaire, and another 10 after a hearing (J.S. App. C16-C17). In registering nonstudents in Waller County, appellant does not use his questionnaire, but instead registers voters on the basis of tax roll records and the asserted personal knowledge of appellant and his deputies regarding the prospective voter's qualifications (J.S. App. C15).[1]

2. Although appellant is responsible under Texas law for registering voters in the county (V.A.T.S. Election Code (Cum. Supp. 1977), Article 5.09a), the Secretary of State is the chief election officer of the State (*id.*, Article 1.03). The Texas Election Code provides that the Secretary of State "shall prescribe the application form" for voter registration and that the "registrar in each county shall accept any application made upon any form prescribed by the Secretary of State which supplies all the necessary information for registration" (*id.*, Article 5.13a). Included in the information that must be provided on the registration form is a statement

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[1]The district court noted that of the persons registered on the basis of asserted personal knowledge, many appeared not to know appellant and not to know how he could have knowledge of their residence. In addition, the court noted that appellant and his deputies had been unable to state, with reference to a large number of persons who had been registered on the basis of claimed personal knowledge, that they had any personal knowledge concerning the residence of those persons (J.S. App. C19).

that the applicant is a resident of the county in which he seeks to vote (*id.*, Article 5.13b(6). The Code further provides (*id.*, Article 5.02) that the Secretary of State

> shall, by directive, implement the policies stated herein throughout the elective procedures and policies by or under authority of this state. Enforcement of any directive of the Secretary of State pursuant to this section may be by injunction obtained by the Attorney General.

In September 1977, the Secretary of State issued a directive, entitled Emergency Rule 004.30.05.313, which prohibited registrars from using any questionnaire or requiring any additional information from an applicant who has properly completed a state voter registration application (J.S. App. C13). Appellant disregarded the Secretary of State's directive, however, and continued to use his own questionnaire, which requires additional information beyond that required on the official state registration application (J.S. App. C15 to C18). By using his special questionnaire, appellant thus continued to apply a far more stringent test for residency than is used in any of the 253 other counties in Texas, including the 70 counties that contain other institutions of higher education (J.S. App. C11-C12; see Motion to Dismiss or Affirm of the State of Texas, p. 2).[2]

Appellant has devised his questionnaire and his voter registration practices in reliance on a provision in the Texas Election Code that students are presumed not to be residents of the county where they attend college. That

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[2]Appellant began applying these more stringent standards in 1966, when a significant number of students from Prairie View A & M began to try to register to vote in Waller County (J.S. App. C14).

presumption, however, was declared invalid in *Whatley* v. *Clark*, 482 F. 2d 1230 (C.A. 5), certiorari denied, 415 U.S. 934, and the State of Texas does not rely on the presumption. Instead, the State has taken the position that students should be entitled to vote where they consider themselves to be residents, even if that is the county where they attend school rather than the county where their parents reside (Motion to Dismiss or Affirm of the State of Texas, p. 2).

In giving effect to the presumption against residency for students, appellant has taken the position (J.S. App. C16)

> that generally students are not regarded by him as residents unless they do something to qualify as permanent residents, such as marrying and living with their spouse or obtaining a promise of a job in Waller County when they complete school. He does not regard a dormitory room as a permanent residence, and regards a permanent residence, only as a place with a refrigerator, stove and furniture.[3]

3. The Attorney General filed this action on October 14, 1976, seeking injunctive and declaratory relief on the ground that appellant's voter registration practices violated 42 U.S.C. 1971(a), 1973, 1973bb, and the Fourteenth, Fifteenth, and Twenty-Sixth Amendments.[4] The State of Texas, the Texas Secretary of State, and the

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[3]Appellant has two general exceptions to his refusal to register students who live in the Prairie View dormitories. He routinely registers students whose parents live in Waller County and married students, if both live in Waller County (J.S. App. C18).

[4]This is the third suit seeking to enjoin some aspect of appellant's voter registration practices. See *Wilson* v. *Symm*, 341 F. Supp. 8 (S.D. Tex.); *Ballas* v. *Symm*, 351 F. Supp. 876 (S.D. Tex.), affirmed, 494 F. 2d 1167 (C.A. 5).

Texas Attorney General, all named as defendants, cross-claimed against appellant, asserting that Emergency Rule 004.30.05.313 prohibits the use of appellant's questionnaires. They sought an injunction prohibiting appellant from continuing to use the questionnaire contrary to the directions of that rule (J.S. App. C8). Appellant then cross-claimed against the Texas defendants, seeking a declaratory judgment that the Secretary of State had no authority under state law to issue the Emergency Rule or to prohibit his using the questionnaire. In March 1977, the three-judge district court abstained (J.S. App. F1-F22), in order to allow state law issues to be decided in state courts. The court of appeals reversed the abstention decision (J.S. App. D), and the case proceeded to trial.[5]

The district court held that appellant's practices violated both Texas law and certain federal constitutional and statutory guarantees of equal voting rights (J.S. App. C31-C38, C21-C30, C38-C41). It entered an injunction that, *inter alia*, required that college students of Waller County be permitted to register and vote "on the same basis and by application of the same standards and procedures as non-students * * *" (J.S. App. B1); prohibited appellant from applying a presumption that college students are not residents of the county in which they attend school (J.S. App. B2-B3); prohibited appellant from using his special questionnaire; and ordered him to "register students on the basis of the information contained in the state-approved registration form, as is done elsewhere in

[5]Appellant does not challenge the ruling that abstention was improper.

Texas," unless he had "tangible, recordable evidence" that a particular applicant was not a *bona fide* resident of Waller County (J.S. App. B3).[6]

ARGUMENT

The district court properly held that appellant's voter registration practices impermissibly abridged the voting rights of a large number of black students attending college in Waller County. Notwithstanding appellant's efforts to paint the issue presented in this case broadly, the issue is in fact very narrow. The decision below affects voter registration practices in only one of the 254 counties in Texas. Moreover, the court did not strike down any State or local statute or ordinance; in fact, it upheld the construction of Texas law under which the Texas Attorney General contended that appellant's voter registration practices were unlawful. Nor did the court hold that appellant would have to give any special consideration to students at Prairie View A & M in the course of voter registration. Quite the contrary, the court held that appellant must consider the Prairie View students' applications on the same basis that he considers other prospective voters' applications, and on the same basis that is provided under Texas law for considering registration applications throughout the State. Finally, appellant has now conceded that the key provision of the district court's order—the prohibition against appellant's use of the statutory presumption that students are not

[6]Because the state defendants had in effect joined the United States as plaintiffs in arguing that appellant's practices were unlawful, the court found it unnecessary to grant any relief against the Texas defendants (J.S. App. C41-C42). The court also denied the relief sought by appellant against the Texas Secretary of State and Attorney General (J.S. App. B5).

residents of the counties in which they attend college—was properly entered by the district court (J.S. 22).

1. The district court's order is based in substantial part on state law. Accordingly, even if this Court were to determine that the district court misapplied federal statutory and constitutional principles applicable to voting rights, the judgment would still be supported by an adequate and independent state ground. Cf. *Herb* v. *Pitcairn,* 324 U.S. 117; *Minnesota* v. *National Tea Co.,* 309 U.S. 551; *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487. To be sure, the state ground was set forth by a federal rather than a state court, but that ground was and is supported by the State's Attorney General and its chief election officer, and it was upheld by a local three-judge court familiar with the State's laws and practices. See *Runyon* v. *McCrary,* 427 U.S. 160, 181-182; *Bishop* v. *Wood,* 426 U.S. 341, 346 and n. 10; *Propper* v. *Clark,* 337 U.S. 472, 486-487.

Contrary to appellant's contention (J.S. 24-28), we agree with the State appellees that the decision below "reinforced the Texas law" (Motion to Dismiss or Affirm of the State of Texas, p. 8). First, under Texas law, a person is not required to prove that he intends to remain in a location permanently or for any particular length of time in order to establish residency (J.S. App. C31-C34).[7] Appellant departs from this standard by requiring students to show that they expect ro reside in Waller

[7]In *Mills* v. *Barlett,* 377 S.W. 2d 636, 637, the Texas Supreme Court wrote:

> Neither bodily presence alone nor intention alone will suffice to create the residence, but when the two coincide at that moment the residence is fixed and determined. There is no specific length of time for the bodily presence to continue * * *.

County for a particular length of time, *i.e.,* for some period after they finish college.

Appellant's use of his special questionnaire was also contrary to Texas law because it was in direct violation of the Secretary of State's directive that no such special applications were to be used in registering voters in the State. The district court properly rejected appellant's contention that the Secretary had no authority under State law to issue that directive (J.S. App. C36-C37). As noted above, the Texas Election Code makes the Secretary of State the chief election officer of the State, with the statutory responsibility "to obtain and maintain uniformity in the application, operation, and interpretation of the election laws" (Texas Election Code, Article 1.03). In carrying out that responsibility, the Secretary of State is instructed to "cause to be prepared and distributed to each county judge, county tax assessor-collector * * * detailed and comprehensive written directives and instructions relating to and based upon the election laws as they apply to elections * * *" (*ibid.*). Moreover, the Secretary of State is instructed to implement the state policies governing registration and voting by directive, and the State Attorney General is authorized to enforce those directives by injunction, if necessary (Texas Election Code, Article 5.02(b)). The Texas Election Code was amended in 1975 to give the Secretary of State these supervisory powers, apparently to address the problem of appellant's registration practices (see J.S. App. C36), and in response to contrary language in the opinion in *Ballas* v. *Symm, supra,* 351 F. Supp. at 888, interpreting the previous statute. Accordingly, the district court was clearly correct in holding that under state law, appellant's registration practices were improper.

2. As the district court further held, appellant's voter registration practices violate federal law as well.

A state may require that applicants be *bona fide* residents of the state or appropriate political subdivision in order to register to vote. See, *e.g., Dunn* v. *Blumstein,* 405 U.S. 330, 351; *Carrington* v. *Rash,* 380 U.S. 89, 96. But in this case, appellant has singled out a particular group—students living on the campus of Prairie View A & M University—and has placed an extra burden on them that he does not impose on non-students—one that is placed on no other prospective voters in the state. Such a practice violates the Equal Protection Clause by denying a particular group of citizens the right "to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn* v. *Blumstein, supra,* 405 U.S. at 336; *Frazier* v. *Callicutt,* 383 F. Supp. 15 (N.D. Miss.); *Sloane* v. *Smith,* 351 F. Supp. 1299 (M.D. Pa.); *Bright* v. *Baesler,* 336 F. Supp. 527 (E.D. Ky.).[8]

The evidence overhelmingly supports the district court's finding that appellant's practices discriminated against students at Prairie View. Appellant insisted that college students and those with campus addresses complete his questionnaire; he required students to show an expectation of permanent residency in Waller County (J.S. App. C16); and he did not apply similar standards to non-students (J.S. App. C19).

The basis for these discriminatory practices, appellant admitted, was to enforce the statutory presumption against student non-residency. Yet appellant has now abandoned his objection to the portion of the injunction barring him from applying that presumption, and he has

[8]The class of citizens disfranchised by appellant's practices was, of course, distinctive not only because it was almost entirely composed of students, but also because it was largely composed of persons between the ages of 18 and 21, and because it was entirely black.

conceded that "under the present case law" (J.S. 22) that presumption is unconstitutional. Nonetheless, appellant seeks to avoid the effect of his own admission that his voter registration system was designed to implement the presumption of student non-residency (J.S. App. C14, C16) by arguing that "an examination of the facts and circumstances clarifies what Symm is actually doing, and there is much more involved than a simple presumption" (J.S. 22). The district court, however, specifically found that appellant was applying the presumption (J.S. App. C14, C19-C20), and appellant's effort to put a different face on his conduct is contrary to the district court's well supported findings. As the court of appeals held in *Whatley* v. *Clark, supra,* and as appellant now apparently concedes, the presumption of student non-residency serves no compelling governmental interest.[9] Appellant's practices thus cannot survive the careful and meticulous scrutiny to which exclusionary voting practices must be subjected under the Equal Protection Clause, *Kramer* v. *Union Free School District No. 15,* 395 U.S. 621, 626; see also *Evans* v. *Cornman,* 398 U.S. 419, 422; *Williams* v. *Rhodes,* 393 U.S. 23, 31.[10] Moreover, since appellant's

[9]Other courts have similarly concluded that presumptions of student non-residency do not further compelling governmental interests and thus do not satisfy the demands of the Equal Protection Clause. See *Shivelhood* v. *Davis,* 336 F. Supp. 1111 (D. Vt.); *Wilkins* v. *Bentley,* 385 Mich. 670, 189 N.W. 2d 423; *Worden* v. *Mercer County Board of Elections,* 61 N.J. 325, 294 A. 2d 233.

[10]Appellant's contention (J.S. 6) that no one is denied the right to vote, but that certain persons are merely required to vote elsewhere does not lessen the discriminatory nature of appellant's practices. *Carrington* v. *Rash, supra*; *Evans* v. *Cornman, supra.* The County, like the State itself, is constitutionally obligated to afford equal protection of the laws "within its borders * * *." *Missouri ex rel. Gaines* v. *Canada,* 305 U.S. 337, 351. See also, *Gomillion* v. *Lightfoot,* 364 U.S. 339, 349 (Whittaker, J., concurring) (segregation of citizens by race into separate voting jurisdictions violates the Equal Protection Clause of the Fourteenth Amendment).

practices were directed at a group having a high concentration of persons in the 18 to 21 age group (see J.S. App. C11), those practices offend interests implicated by the Twenty-Sixth Amendment as well as the Equal Protection Clause. See *Worden* v. *Mercer County Board of Elections, supra.* Fifteenth Amendment interests also are implicated, since the group subjected to disparate treatment is racially defined. Cf. *Gomillion* v. *Lightfoot,* 364 U.S. 339.

Appellant's practices also violate 42 U.S.C. 1971(a)(2)(A), the statutory guarantee of equal voting rights. That statute provides that no state or local official may "apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish or similar political subdivision who have been found by State officials to be qualified to vote." The district court's finding that appellant applied a different standard for determining residency to the students at Prairie View from the standard applied to other Waller County citizens falls directly within the prohibition of this provision. The language and legislative history of the statute indicate that discrimination on nonracial as well as racial grounds is prohibited. See Guido, *Student Voting and Residency Qualifications: The Aftermath of the Twenty-Sixth Amendment,* 47 N.Y.U. L. Rev. 32, 53-57 (1972). In this case, however, a violation of the statute is established under either construction, since all the persons subjected to appellant's questionnaire procedure were black. See *Frazier* v. *Callicut,* 383 F. Supp. 15 (N.D. Miss.).

4. Finally, appellant argues (J.S. 32-42) that this case should have been governed by the decisions in his favor in

the two previous challenges to his voter registration practices, *Wilson* v. *Symm, supra,* and *Ballas* v. *Symm, supra.* As the district court observed, however, those cases are not controlling here. In *Wilson,* the district court held that appellant's use of his questionnaire was a reasonable means of enforcing the statutory presumption of student non-residency in Article 5.08(k) of the Texas Election Code. After the decision, the Fifth Circuit held the presumption invalid in *Whatley* v. *Clark, supra,* thus depriving the *Wilson* case of any precedential value. In *Ballas,* the court held simply that the use of a questionnaire to determine residency did not violate the Constitution, in light of the court's finding that there was no proof that the questionnaire was used as a device to prevent legal residents from voting.

Since the government was not in privity with the private plaintiffs in either *Wilson* or *Ballas,* those decisions are not binding on the United States, which has independent authority to sue to prohibit violations of individuals' civil rights. Cf. *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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JOHN C. HOYLE
Attorneys

SEPTEMBER 1978

DOJ-1978-09

IN THE

SUPREME COURT OF THE UNITED STATES

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NO. 77-1688

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LE ROY SYMM,

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V.

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Appellees.

• • •

On Appeal From The United States District Court For The Southern District Of Texas

• • •

MOTION TO DISMISS OR AFFIRM

• • •

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• • •

The State of Texas, Steven C. Oaks, its Secretary of State*, and John L. Hill, its Attorney General, respectfully file this motion to dismiss the appeal or, alternatively, to affirm the judgment of the district court.

For many years students at Prairie View A & M University located in Waller County, Texas, have

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*At the time of the filing of this suit and until October 17, 1977 when he resigned, Mark White was the Secretary of State of the State of Texas. On November 7, 1977 Steven C. Oaks was appointed to fill the vacancy and presently serves as Secretary of State. This fact was recognized in the Order of the district court dated March 3, 1978 (Appendix B1 to the Jurisdictional Statement).

attempted to register to vote in that county. They have been before the federal courts on two prior occasions: *Wilson v. Symm*, 341 F.Supp. 8 (S.D. Tex. 1972); and *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972) *aff'd Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974). Their efforts were unavailing and, with the blessings of the federal courts, Mr. Symm, as the registrar of voters of Waller County, continued to use a written questionnaire which, at least, had the effect of discouraging applicants from pressing their application to vote and resulted in a great majority of the students at Prairie View A & M University not being registered to vote in Waller County.

The practices engaged in by Mr. Symm are not employed anywhere else in the other 253 counties of the State of Texas. Nevertheless, their employment by Mr. Symm has embroiled not only Waller County but the State of Texas and its officials in litigation since *Wilson v. Symm, supra*, was first filed in 1971. It was then the position of the State of Texas, as it is now, that students should be entitled to vote where they considered themselves to be residents, even if that happened to be the county where they attended school and not the county where their parents resided. Twice, the Secretary of State of Texas has issued a directive prohibiting use of a questionnaire. Once, the questionnaire was held to be ineffective and now, a similar one has been upheld and enforced.

This suit was filed shortly before the 1976 general elections apparently with the hope that, through the granting of extraordinary relief, students at Prairie View A & M University would be registered to vote in the 1976 elections in Waller County. This did not come about. Finally, in early 1978 the case was resolved in the district court and students were able to register to vote and to vote in Waller County in the May 6 primary

elections and the general elections to be held in November of 1978.

The issues are not complex ones. Since the questionnaire is not used anywhere else in Texas, it is unlikely that any decision will set any important precedents. For these reasons and those set out below, the State of Texas urges the Court to either dismiss the appeal or to affirm it summarily.

CONTEST TO JURISDICTION

The Jurisdictional Statement (p. 2) predicates jurisdiction in this Court on section 1253 of Title 28, United States Code, and section 1973bb, Title 42, United States Code.

Section 1973bb directs the Attorney General to institute actions "against States or political subdivisions" for injunctive relief to implement the Twenty-sixth Article of Amendment to the Constitution of the United States. It provides that the District Courts of the United States "shall" have jurisdiction of such suits to be heard and determined by a court of three judges "and any appeal shall lie to the Supreme Court." So far we have been able to find that this statute has been judicially construed.

If the appeal provisions of section 1973bb are to be construed literally and broadly, then this Court has jurisdiction of this appeal, at least insofar as it is based on the Twenty-sixth Amendment.

On the other hand, if, as is true of section 1253, the Court construes its jurisdiction narrowly [*Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 96-98, 95 S.Ct. 293-294 (1974)], jurisdiction is lacking.

The complaint filed by the United States named as Defendants these three Appellees, Waller County and

LeRoy Symm. Waller County was alleged to be a political and geographical subdivision of the Defendant State of Texas. Symm was alleged to be the Tax Assessor-Collector (registrar of voters) of Waller County. At the same time, the United States filed its motion to convene a district court of three judges. Such a court was appointed and Appellant Symm thereafter moved to dissolve the three judge court asserting that the Twenty-sixth Amendment claim was insubstantial.

These Appellees, as Defendants, filed a motion to dismiss pursuant to Rule 12(b), Federal Rules of Civil Procedure, on the ground that the complaint failed to state a claim against any of them upon which relief might be granted.

The undisputed facts show that as early as 1972 the State of Texas, acting through its then Secretary of State Bob Bullock, attempted to resolve the problems occasioned by Appellant's use of the questionnaire only to be thwarted by the decision of the United States District Court in *Ballas v. Symm*, 351 F.Supp. 876 (S.D. Tex. 1972), in which Judge Noel characterized a bulletin issued by the Secretary of State and prohibiting use of a questionnaire

> to be utterly lacking in candor or credibility; legally incorrect; misleading; in excess of the statutory authority; and, irrelevant.

(351 F.Supp. at 888).
The decision was affirmed by the United States Court of Appeals for the Fifth Circuit in *Ballas v. Symm*, 494 F.2d 1167 (5th Cir. 1974), which also approved use of the questionnaire finding that such use was not shown to be a violation of the Civil Rights Act. Thereafter, state officials labored under the impression that they were powerless to restrain Mr. Symm from use of the procedures he followed in determining residency.

Following the decision in *Ballas v. Symm*, the Legislature expanded the powers of the Secretary of State by adding subparagraph (b) to article 5.08, Vernon's Texas Election Code. (Appendix M1-M3 to the Jurisdictional Statement). The Secretary of State issued an emergency rule pursuant to this statute (Appendix C13 to the Jurisdictional Statement) prohibiting use of the questionnaire or any additional written information as a prerequisite to registration as a voter.

The questions presented by this suit as originally filed and certainly by this appeal are insubstantial because

(1) the suit involves only the practices of one official in one county (of 254 counties) without the approval of the State;

(2) the constitutionality of no state statute is in question;

(3) the constitutionality of no statewide practice is in question;

(4) no conduct of the state or any of its political subdivisions has been found to have deprived any person of any right guaranteed by the Constitution or laws of the United States, including the Twenty-sixth Amendment;

(5) no state official has been found to have violated any rights of any voter provided by the Constitution or laws of the United States, including the Twenty-sixth Amendment;

(6) the decision of the United States District Court has affirmed the validity of the Texas statutes and the Texas law with reference to determination of residence;

(7) the United States District Court has affirmed the authority of the Secretary of State of Texas and the

Attorney General of the State to enforce voter registration laws and directives issued to support them.

Appellant does not seek a determination by this Court that any Texas statute is unconstitutional, that the State or some political subdivision has, in fact, violated voting rights, or that any state official has violated voting rights. He does not ask that the Texas statutes with reference to residence of voters be changed. His sole claim before this Court is that the district court erred in holding that he, the registrar of voters in one of 254 counties, could not impose on applicants for registration burdens neither required nor authorized by the statutes and not imposed anywhere else in the state. *That is an insubstantial question.*

Alternatively, the State of Texas, its Secretary of State and its Attorney General are not parties to the dispute between the United States and Appellant. The United States District Court found that these Appellees had taken all practicable steps within their command to encourage Mr. Symm to apply a correct rule of law and to protect the constitutional rights of students at Prairie View A & M University. (Appendix C42 to the Jurisdictional Statement). Accordingly, no relief was granted against these Appellees (Appendix C42 to the Jurisdictional Statement; Par. 8, Appendix B5 to the Jurisdictional Statement). Only the sixth question presented by Appellant directly affects these Appellees. (Jurisdictional Statement, p. 3). And only pages 41 and 42 of the discussion in the Jurisdictional Statement are devoted to it, concluding with the statement:

> Additional argument and authorities pertaining to the pendent cross-claims will be presented in a brief on the merits if permitted by the Court.

This, too, is an insubstantial question and, as to these Appellees, the appeal should be dismissed.

THE DECISION OF THE DISTRICT COURT SHOULD BE AFFIRMED

Questions Presented

The State of Texas, its Secretary of State and the Attorney General of Texas would submit that, rather than the questions stated in the Jurisdictional Statement, the only questions presented by this appeal are:

(1) Whether the district court correctly held that the means employed by Appellant in determining whether or not an applicant for voter registration met the state requirements for registration illegally denied or abridged the rights of citizens of Waller County to vote;

(2) Whether the district court abused its discretion in enjoining the continued use by Appellant of criteria in determining whether or not an applicant for voter registration was a resident of Waller County, Texas, which criteria were neither required nor authorized by any state law;

(3) Whether the district court erred in enjoining Appellant from the continued use of the questionnaire and requiring that he register applicants for voter registration on the basis of information contained in the state-approved registration form;

(4) Whether the district court erred in holding that the State of Texas have judgment against Appellant ordering that Appellant obey Rule 004.30.05.313 of the Rules of the Secretary of State and that he cease using the written questionnaire with reference to the registration of voters in Waller County.

Statement of the Case

The Statement of the Case contained in the Jurisdictional Statement basically is correct and we will rely on it except as may be noted hereafter in this argument.

Argument

Throughout his Jurisdictional Statement, Appellant has attempted to make it appear that the judgment of the district court has overruled the established law of the State of Texas as to what constitutes residence for the purpose of voting. To the contrary, the Court has reinforced the Texas law. Appellant Symm was employing a questionnaire which had no basis in Texas law. No statute authorized it and, other than the holding of the United States Courts in *Ballas v. Symm, supra*, no court decision upheld its use.

Appellant has collected some of the Texas statutes dealing with residence for election purposes in the Appendices to his Jurisdictional Statement. Article 5.01 (Appendix K1 to the Jurisdictional Statement) and Article 5.02 (Appendix L1 to the Jurisdictional Statement) define the qualification for voting purposes in the State of Texas. A person must be 18 years of age or older, must be a citizen of the United States and a resident of the State of Texas, may not be an idiot or lunatic or a pauper and may not have been convicted of any felony except if he has been restored to full citizenship and the right of suffrage or pardoned. It is provided by Article 5.02 that no person may vote in any precinct other than that in which he resides.

Article 5.08 (Appendix M1 to the Jurisdictional Statement) defines the word "residence" to mean domicile "i.e., one's home and fixed place of habitation to which he intends to return after any temporary absence." The article contains other provisions applicable to specific situations, one of which is the residence of a student in subdivision (k). This was the subject of the decisions in *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1973, *cert. den'd* 1974). Omitting the presumption held to be unconstitutional in *Whatley*, subsection (k) provides:

> A student shall not be considered to have acquired a residence at the place where he lives while attending school unless he intends to remain there and to make that place his home indefinitely after he ceases to be a student.

Article 5.10a of Vernon's Texas Election Code (Appendix O1 to the Jurisdictional Statement) authorizes a person to register as a voter in the precinct in which he has his legal residence as defined in Article 5.08 if not otherwise disqualified.

Article 5.13b (Appendix A hereto) lists required information to be contained on an application form for voter registration. In subdivision (2) of the article, provision is made for certain optional information such as the number of the election precinct in which the applicant resides and the applicant's social security and telephone numbers.

Article 5.17a (Appendix P1-P2 to the Jurisdictional Statement) provides for challenge of the registration of a voter either before or after registration occurs. It provides for an appeal to a district court of the state, which court is to give priority to the appeal if an election is pending within 60 days.

Article 5.13a, (Appendix B hereto) requires that the Secretary of State prescribe the application form and a sample of the form is found in the Appendix to the Jurisdictional Statement at page R1.

The order of the district court does not touch any of these statutes in any way. It does not hold any of them to be unconstitutional or unenforceable. Quite to the contrary, it does no more than order Appellant Symm to register voters on the basis of the information contained in the official application and without asking them questions such as, Are you a college student? If so, where do you attend school? How long have you been a student at such school? Where do you live while in college? How long have you lived in Texas? In Waller County? Do you intend to reside in Waller County indefinitely? How long have you considered yourslef to be a bona fide resident of Waller County? What do you plan to do when you finish your college education?, etc. These and the other questions asked by Mr. Symm of applicants for registration in Waller County are not asked anywhere else in the state.

We cannot argue with the authorities cited either in the Memorandum Opinion of the district court (Appendix C1-C43) or in the Jurisdictional Statement. As the Supreme Court of Texas said in *Mills v. Bartlett*, 377 S.W.2d 636 (Tex.Sup. 1964), "residence" involves volition, intention and action. To a large extent these are subjective. When an applicant to register as a voter is physically present in Waller County and says that it is both his intention and will that he be a resident of Waller County, questions as to whether he has a job in the county, owns a home in the county, has an automobile registered in the county, lists his telephone in the county, and others of that sort, shed little light on whether, in fact, at that time he is a resident.

In effect, Appellant says that certain indicia can form the basis for a prediction that a person will not remain in Waller County and thus that he lacks the necessary intent to remain indefinitely. But the same may be true of persons who have resided in Waller County all their lives. The probability may be less, but some of those persons will leave and will become residents of other places. If the latter are not denied the right to vote, why should the former?

The district court held that the procedure used by Appellant Symm, including the questionnaire, is not a valid test of whether a person is, at that time, a resident of Waller County and that its use had the effect of deterring persons from applying for voter registration. The court did not say that Mr. Symm could not apply the statutory tests or that he could not refuse to register an applicant.

When viewed in this light, it is obvious that the decision of the distict court was a correct one and should be summarily affirmed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

This is to certify that true and correct copies of the foregoing Motion to Dismiss or Affirm has been placed, postage prepaid, in the United States First Class Mail on this the ___ day of June, 1978, addressed to:

Solicitor General
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Washington, D.C. 20530

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DAVID M. KENDALL

APPENDIX A

Art. 5.13b. Information on application.

Subdivision 1. Required information. An application form for voter registration shall provide that the following required information be furnished by the applicant:

(1) The applicant's first name, middle name (if any), and surname. If the applicant is a married woman using her husband's surname, she shall furnish her first name, maiden name, and husband's surname.

(2) The applicant's sex.

(3) The month, day, and year of the applicant's birth, and city or county and state, or foreign country, where the applicant was born.

(4) A statement that the applicant is a citizen of the United States.

(5) If a naturalized citizen, the court of naturalization, or its location.

(6) A statement that the applicant is a resident of the county.

(7) If the applicant is currently registered in another county or if the applicant was registered in the previous two-year certificate period in any county in the state and has not received a registration certificate for the current two-year certificate period, the name of that county and the applicant's residence address as shown on such registration certificate.

(8) The registrant's complete current permanent residence address (including apartment number, if any); or, in none, a concise description of the location of the registrant's residence.

(9) The address to which the registration certificate is to be mailed, but only if mail cannot be delivered to the registrant's permanent residence.

(10) If the application is made by an agent, a statement of the agent's relationship to the applicant.

Subdivision 2. Optional information. The application form shall contain a space for showing the election precinct in which the applicant resides, but an application is not deficient for failure to list the number or name of the precinct or for listing an incorrect number or name where the applicant's correct permanent residence address is given. It shall also contain a space for the applicant's social security number and telephone number, but an application is not deficient for failure to list these numbers. However, should it be made possible for the state to require that a registrant provide his social security number when applying for a registration certificate, the providing of such a number by all those applicants who possess such a number may be made mandatory by directive of the Secretary of State in the exercise of his authority pursuant to the provisions of Art. 1.03. The registrar shall not transcribe, copy, or record any telephone number furnished on an application for registration.

APPENDIX B

Art. 5.13a. Mode of applying for registration; period for which registration is effective.

Subdivision 1. Registration shall be conducted at all times the registrar's office is open for business. A person may apply for registration in person or by mail. Each applicant shall submit to the registrar of the county in which he resides a written application which supplies all the information required by Article 5.13b, Vernon's Texas Election Code. The Secretary of State shall prescribe the application form. The application for registration by mail shall be in the form of a business reply postcard, or other suitable form, with postage to be paid by the state. The Secretary of State shall make necessary arrangements with the United States Postal Service for obtaining a permit for use of the business reply mail form, or other suitable form, and for payment of the postal charges through warrants issued by the comptroller of public accounts. The Secretary of State shall be authorized to use any form or system made available by the United States Postal Service if such other form or system will be less costly than business reply, and he shall be authorized to implement any procedures necessary to accommodate such other form or system. The applications shall be available to individuals, organizations, businesses, and political subdivisions in reasonable quantities. No fee shall ever be charged for voter registration applications. The Secretary of State may prescribe one or more forms for use in counties using electronic data processing methods for issuing voter registration certificates and a different form for use in counties not using those methods, but the registrar in each county shall accept any application made upon any form prescribed by the Secretary of State which supplies all the necessary information for registration. In addition to other

requirements, the application form shall contain the following statement: "I understand that the giving of false information to procure the registration of a voter is a felony." It shall also contain a space for recording the number of the voter's registration certificate.

Subdivision 2. The application shall be signed by the applicant or his agent. However, if the person making the application is unable to sign his name either because of physical disabiliy or illiteracy, he shall affix his mark, if able to do so, which shall be attested by a witness, whose signature and address shall be shown on the application. If a person making the application is physically unable to make a mark, the witness shall so state on the application.

Subdivision 3. The husband, wife, father, mother, son, or daughter of a person entitled to register may act as agent for such person in applying for registration, without the necessity of written authorization therefor, may sign for the applicant, and may receive the registration certificate. However, none of these persons may act as agent unless he is a qualified elector of the county. No person other than those mentioned in this subdivision may act as agent for a person in applying for registration. Except as permitted in this subdivision, a person who wilfully acts as agent for another in applying for registration or in obtaining a registration certificate is guilty of a Class B misdemeanor.

Subdivision 4. A registration becomes effective on the 30th day after the date on which the registrar receives the application or on the day that the registrant attains the age of 18 years (the day before his 18th birthday), whichever is later. An application by mail is deemed to have been received by the registrar when it is actually placed into the possession of the registrar or his agent by a post-office employee, or is deposited in the

registrar's mail box, or is left at the usual place of delivery for the registrar's official mail. If the registrar is unable to determine the exact date on which the application is deposited in his mail box, he shall treat it as having been deposited on the date of the last previous removal of mail from the box. Every registration of a voter which becomes effective on or after March 1, 1976, shall continue in effect until cancelled under some provision of this code.

Subdivision 5. Any person who applies for registration of any person, or who signs an application purporting to be the application for registration of any person, either real or fictitious, other than the person making the application or affixing the signature, or someone for whom he may lawfully act as agent, or someone who is unable to sign and who requests him to sign for such other person, is guilty of a felony of the third degree.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1688

LE ROY SYMM, *Appellant*,

v.

UNITED STATES OF AMERICA, et al., *Appellees*.

On Appeal From The United States District Court For The Southern District Of Texas

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BRIEF OPPOSING THE UNITED STATES' MOTION TO AFFIRM

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BRIEF OPPOSING THE UNITED STATES' MOTION TO AFFIRM

The unavoidable issue in this case is the meaning of residence for voting purposes. "Residence" was clearly construed in the published opinion of the district court. Words and phrases are defined by judicial construction. Thus, inescapably the definition of residence was affected by the decision of the lower court. That decision unequivocally says that students who are in Waller County only for the duration of their college education and have no intention of remaining in the county after its completion are voting residents. Historically, 96.37% of the

students at Prairie View A&M University fall into this category. Of 13,038 total alumni, only 473 have mailing addresses in Waller County. (Waller County Exhibit 9). William Dawn, a student deposed by the United States, would be considered a resident by the district court even though he testified "I am a resident of Dallas County." (Prairie View Student Depositions 79). So would Leon Kirk, another student-deponent, although he said his "address at home" was Fort Worth. (172).

The United States says that the question presented by this appeal is "whether the means used to determine the voting eligibility of students living on a college campus in Waller County, Texas, denied the students the right to vote on an equal basis with other citizens." This is a superficial issue in the case. But the deeper and much more significant question hidden in this language is whether these same students are residents. The "equal basis" established by the United States and the district court is in fact unequal in favor of nonresident students and denies equal protection to the legitimate and enduring interests of bona fide residents of the county. The Texas Election Code defines residence as "one's home and fixed place of habitation to which he intends to return after any temporary absence." Webster defines temporary as "lasting for a time only, impermanent, transitory". How can a student living in a dormitory with no intention of remaining in the county after graduation possibly be considered a resident within the foregoing statutory definition when his or her stay in the county will intentionally "last for a time only"—until completion of college? This Court, the Texas Supreme Court, and virtually every other court that has considered the question has held that duration is not by itself determinative of residence. Intention, volition and action are the elements to be considered and the vast majority of the Prairie View A&M students obviously have no intention of staying in Waller County after graduation. Their stay lasts for a time only. The injunction of the district court says that Mr. Symm must accept the meaningless statements of these individuals on residence. Just submit an application which says you are a resident and *ipso facto* you are a resident. The statements are meaningless because none of the applicants would know the statutory definition and elements of residence. All of the facts and circumstances should be considered, including the statements of the applicant. But even if Mr. Symm is relegated to the applicant's statements and nothing else, he should at least be able to ask the applicant whether he or she intends to remain in the county after graduation. Even this limited and clearly justified inquiry is precluded by the decision of the district court. And finally, Mr. Symm is forbidden to use the challenge procedures authorized by the Texas Election Code. Anyone who considers themself a resident of Waller County (whatever the term means to the individual) is a resident.

Mr. Symm is not implementing a permanent residence requirement or his own standards of residency as the United States erroneously claims. (Motion 2, 10). Neither is he "requiring students to show that they expect to reside in Waller County for a particular length of time . . ." (Motion 8, 9). He is applying the definition of residence contained in the Texas Election Code and only expects some indication that the stay in the county is not temporary, i.e., until the completion of college. Being a Waller County native, having parents or other family in the county, or living with one's spouse in the county are some of the previously accepted and entirely reasonable indicia of more than temporary residence.

The United States argues that the Court below did not require Mr. Symm "to give any special consideration to students at Prairie View A&M in the course of voter registration" (Motion 7) and that in the past, Mr. Symm "has singled out a particular group—students living on the campus of Prairie View A&M University—and has placed an extra burden on them that he does not impose on non-students—one that is placed on no other prospective voters in the state." (Motion 10). Quite to the contrary, it is not an extra burden to be a *bona fide* resident of the community, but students at Prairie View A&M no longer have to satisfy this legitimate prerequisite to voting and are therefore receiving special consideration.

The United States leaves the impression that for the first time on appeal Appellant abandoned an objection to the portion of the injunction barring him from applying a presumption against student nonresidency. This impression is erroneous. Mr. Symm has never objected to that portion of the injunction, and unless *Whatley v. Clark*, 482 F.2d 1230 (5th Cir. 1974), *cert. denied*, 415 U.S. 934, is rejected by this Court, he will not rely on such a presumption. But *Whatley* does not reverse the presumption or hold that students are automatically entitled to voter registration without satisfying residence requirements.

The District Court based its decision primarily on the Twenty-Sixth Amendment, and secondarily on Texas law. The lower court did not base its judgment on the Equal Protection Clause, notwithstanding the United States' current reliance on equal protection arguments to sustain the judgment. The Fifteenth Amendment was also ignored below.

The United States argues that "even if this Court were to determine that the district court misapplied federal statutory and constitutional principles applicable to voting rights, the judgment would still be supported by an adequate and independent state ground." (Motion 8). Cases are then cited apparently to support the proposition that this Court should not disturb the lower court's erroneous construction of state law. But *Herb v. Pitcairn*, 324 U.S. 117; *Minnesota v. National Tea Co.*, 309 U.S. 551, and *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 hold that the Court will not review judgments of *state courts* that rest on adequate and independent state grounds. *Runyon v. McCrary*, 427 U.S. 160, 181-182; *Bishop v. Wood*, 426 U.S. 341, 346 and n. 10, and *Propper v. Clark*, 337 U.S. 472, 486-487, extend the rule to interpretations of state law in which a federal district court and court of appeals have concurred unless their conclusions are shown to be unreasonable. None of the cited cases extend the argument to the present situation in which no appellate court has reviewed the decision. It is also immaterial that the state ground is now supported by the Attorney General and Secretary of State of Texas since both are party-defendants in the suit with individual interests. These defendants never amended their answers in which they admitted expressly that the Secretary of State did not have the statutory authority which they now claim he has. Finally, the conclusion of the district court is not only unreasonable but unconstitutional. The Texas Election Code, Articles 1.03, 5.01, 5.02, 5.08, 5.09a, 5.10a, 5.17a and 5.18a expressly give Mr. Symm the duty and authority to (1) review the residential qualifications of voter applicants, (2) use forms other than those prescribed by the Secretary of State, and (3) reject applicants if

they do not satisfy residency requirements. The Secretary of State of Texas does not have the authority to abrogate the foregoing legislative enactments. Any attempt to confer such authority upon the Secretary of State, as was done by the district court, would amount to an unconstitutional delegation of legislative power. *See Bullock v. Calvert*, 480 S.W.2d 367 (Tex. Sup. 1972). Thus, the judgment is not supported by an adequate and independent state ground; but even if it were, such support would not justify affirming an erroneous interpretation of the 26th Amendment.

The United States also makes little attempt to refute or distinguish the contrary decisions in *Wilson v. Symm* and *Ballas v. Symm*. The same defendant, the same college students, and the same voter registration practices were involved in all three cases. There is no proof that the questionnaire used by Mr. Symm is used as a device to prevent legal residents from voting, unless we assume that students who do not intend to remain in Waller County after they finish college are residents. This case is therefore indistinguishable from *Ballas* and the resulting judgments should be the same.

For the reasons stated, the United States' Motion To Affirm should be denied.

Respectfully submitted,

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Le Roy Symm is the only Appellant in this Court. The Appellees are the United States, the State of Texas, the Attorney General of Texas and the Secretary of State of Texas. This Brief responds to the Motion to Dismiss or Affirm filed on behalf of the State of Texas, the Attorney General of Texas and the Secretary of State of Texas (hereinafter the "State"). The United States has not filed a motion to dismiss or affirm in response to the jurisdictional statement.

As would be expected, the State's Motion argues that the questions involved in this appeal are insubstantial, both in a jurisdictional and precedential sense. The major problem with these arguments is that they focus on form rather than substance.

The State claims the questions are insubstantial in a jurisdictional sense because the case has no statewide implications. But "the lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co. v. City of Redding,* 304 U.S. 252, 255 (1938); *Goosby v. Osser,* 409 U.S. 512, 518 (1973). Assuming, *arguendo,* no state or nationwide implications, it does not necessarily follow that the federal constitutional questions are insubstantial. Thus, the State's jurisdictional argument is without merit. Instead, *Carrington v. Rash,* 380 U.S. 89 (1965), *Wilson v. Symm,* 341 F. Supp. 8 (S. D. Tex. 1972), and *Ballas v. Symm,* 351 F. Supp. 876 (S. D. Tex. 1972), *aff'd,* 494 F.2d 1167 (5th Cir. 1974), render the 26th Amendment claim insubstantial. Appellant moved to dissolve the three-judge court on the basis of these three cases but the motion was denied. If this Court agrees that *Carrington, Wilson* and *Ballas* so control the case as to render the 26th Amendment claims insubstantial, it certainly has "jurisdiction to determine the authority of the court below and to make such corrective order as may be appropriate . . ." *Bailey v. Patterson,* 369 U.S. 31, 34 (1962). Accordingly, the case could be remanded to a one-judge district court for expeditious disposition.

On the merits, this case is far more than the insignificant local dispute portrayed by the State. Many of the 254 voter registrars in Texas are aware of the issues involved in this case and the lower court's decision. Seventy of them were deposed by the United States. 82.85% of those deposed testified that they would not register an applicant as a voter if they knew that his or her good faith residence was in another county. 84.28% testified that they knew they had a statutory duty to register as voters only those applicants who were good faith residents of the county. 87.17% knew that they had a statutory right to question an applicant concerning his or her good faith residence, and 88.57% knew they had a statutory right to challenge an applicant who was not a good faith resident of the county. 87.14% knew that the term "residence" is defined by the Texas Election Code. It is not an exaggeration to say that in light of the lower court's opinion none of these individuals would undertake to question or challenge a voter applicant, even when confronted with the most extreme example of a nonresident. What possible inquiry or challenge could be made without violating the guidelines established by the District Court? And this uncertainty, or emasculation, is not limited to voter registrars in Texas.

The State says "that students should be entitled to vote where they consider themselves to be residents, even if that happened to be the county where they attended school and not the county where their parents resided." (Motion, 2). This is precisely the residence test implemented by the District Court. The intent and statements of the applicant have always been considered but have never controlled to the exclusion of the facts. Virtually

none of the applicants would be aware of the statutory definition and elements of residence. Their intent and statements as to residence, standing alone, would therefore be meaningless, although in most cases the statements would be made in good faith. How does any political subdivision protect and promote its existence if the electors which control its destiny are not in fact residents? No political subdivision could survive and prosper if the electorate only has a temporary interest in the community. Bonded indebtedness, budgeting of expenses and other long-range planning must rely upon continued community interest and support. This argument is not an effort to exclude from the franchise a sector of the population because of the way they may vote, which was proscribed in *Carrington v. Rash,* it is simply an effort to limit the vote to those with the continuing interest in the community of a bona fide resident. That is the reason for a residence requirement to begin with.

The State argues:

> "When an applicant to register as a voter is physically present in Waller County and says that it is both his intention and will that he be a resident of Waller County, questions as to whether he has a job in the county, owns a home in the county, has an automobile registered in the county, lists his telephone in the county, and others of that sort, shed little light on whether, in fact, at that time he is a resident." (Motion, 10)

To the contrary, these inquiries and the others made by Defendant Symm, including the statements of the applicant, are the best available indicia of true residence, which the Texas Election Code defines as "one's home

and fixed place of habitation to which he intends to return after any temporary absence." There are no other objective factors to be considered. If these factors are excluded, nothing remains but the statements of the applicant, which the Appellees and the District Court say should control. But the statements of the applicant have never controlled the issue of residence and they cannot control now if residence is to have any real meaning. Just as a judge or jury must settle and determine disputed facts, someone must determine residence. But disputed facts are not determined by witnesses or parties and residence should not be either. The authority to make the residence determination belongs to the registrar of voters (Appellant Symm) under the Texas Election Code. The District Court and the Appellees have shifted this authority to the voter applicant, who by analogy is only a witness or party to the dispute. Mr. Symm is trying to consider all available evidence and should not be limited to the statements of interested parties.

The State continues:

> "In effect, Appellant says that certain indicia can form the basis for a prediction that a person will not remain in Waller County and thus he lacks the necessary intent to remain indefinitely. But the same may be true of persons who have resided in Waller County all of their lives. The probability may be less, but some of those persons will leave and will become residents of other places. If the latter are not denied the right to vote, why should the former?" (Motion, 11).

Answer: Because limiting the vote to bona fide residents of the community is necessary in order for the community

to survive and prosper, and there are no better indicia on which to base a prediction. Obviously, the indicia are not fail-safe but that does not mean that the whole system should be discarded in favor of no meaningful residence requirement at all. The State could just as easily argue that all criminal prosecutions should cease because some innocent defendants may be convicted and punished. Neither argument is workable in our society.

The State claims that this suit "involves only the practices of one official in one county (of 254 counties) without the approval of the State." (Motion, 5) The approval of the State is found in the Texas Election Code and the State Appellees acknowledged this approval in their Original Answers. In fact, the suit involves the right of all voter registrars to determine residence. While superficially no state statute or statewide practice has been declared unconstitutional, the effect is to render numerous state statutes meaningless. This case does not involve age or race discrimination. It involves residence. Mr. Symm is following the only course which implements a meaningful residence requirement.

On April 19, 1978, this Court decided *Elkins v. Moreno*, ____U.S.____, 98 S.Ct. 1338 (1978). The opinion recognizes that

> "(T)he question of who can become a domiciliary of a State is one in which state governments have the highest interest. Many issues of state law may turn on the definition of domicile: for example, who may vote; who may hold public office; who may obtain a divorce; who must pay the full spectrum of state taxes. In short, the definition of domicile determines who is a full-fledged member

> of the polity of a State, subject to the full power of its laws and participating (except, of course, with respect to aliens) fully in its governance". 98 S.Ct. at 1347, n. 16.

In *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230 (1973), the Court enumerated and approved some of the indicia of residence and invalidated a permanent irrebuttable presumption of nonresidence which precluded the opportunity to show such factors. The enumerated indicia included year-round homes, drivers' licenses, car registrations, property ownership, marital status and vacation employment, among others. 412 U.S. at 448 and 454, 93 S.Ct. at 2234 and 2237. The opinion also states:

> "We are aware, of course, of the special problems involved in determining the bona fide residence of college students who come from out of state to attend that State's public university. Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a state the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status." 412 U.S. at 452, 93 S.Ct. at 2236.

Both *Elkins* and *Vlandis* were Fourteenth Amendment cases involving residence for tuition purposes and therefore do not directly control the Twenty-Sixth Amendment voting residence issues involved in this case. They do, however, along with *Carrington v. Rash*, reflect this Court's continuing support of State residence require-

ments in all contexts. Likewise, Appellant Symm and all other voter registrars, and the communities they represent, have a continuing interest in limiting the vote to bona fide residents. Mr. Symm should not apply an irrebuttable presumption of nonresidence to dormitory students, but neither should he be limited to the other extreme of considering only the conclusional statement of the applicant that he or she is a resident. And he certainly should not be told by a federal district court that all unemployed dormitory students, who own no property in the county, do not stay in the county during vacation, and do not intend to stay in the county after graduation are residents for voting purposes (which is exactly what the injunction says). He should be permitted to examine all reasonable indicia of residence before making a determination and registering an applicant as a voter.

For the reasons stated, the State's Motion to Dismiss or Affirm should be denied.

Respectfully submitted,

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